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MIDNIGHT REGULATIONS: EXAMINING EXECUTIVE BRANCH OVERREACH

HEARING

BEFORE THE

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

February 10, 2016

Serial No. 114–60

Printed for the use of the Committee on Science, Space, and Technology

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MIDNIGHT REGULATIONS: EXAMINING EXECUTIVE BRANCH OVERREACH

WEDNESDAY, FEBRUARY 10, 2016

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY,
Washington, D.C.

The Committee met, pursuant to call, at 10:06 a.m., in Room 2318, Rayburn House Office Building, Hon. Lamar Smith [Chairman of the Committee] presiding.

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States

House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
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Full Committee

Midnight Regulations: Examining Executive Branch Overreach

Wednesday, February 10, 2016
10:00 a.m. – 12:00 p.m.
2318 Rayburn House Office Building

Witnesses

Ms. Karen Kerrigan, President and CEO, Small Business & Entrepreneurship Council

Mr. Jerry Bosworth, President, Bosworth Air Conditioning

Ms. Kateri Callahan, President, Alliance to Save Energy

Mr. Sam Batkins, Director of Regulatory Policy, American Action

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

HEARING CHARTER

Midnight Regulations: Examining Executive Branch Overreach

Wednesday, February 10, 2016
10:00 a.m. – 12:00 p.m.
2318 Rayburn House Office Building

PURPOSE

The Committee on Science, Space, and Technology will hold a hearing entitled *Midnight Regulations: Examining Executive Branch Overreach* on Wednesday, February 10, 2016, in Room 2318 of the Rayburn House Office Building. The hearing will examine the various science and policy issues surrounding the regulatory rulemaking that often occurs toward the end of a Presidential Administration or "midnight regulations." The hearing will focus on proposed regulations by the U.S. Department of Energy (DOE) and the U.S. Environmental Protection Agency (EPA).

WITNESS LIST

- **Ms. Karen Kerrigan**, President and CEO, Small Business & Entrepreneurship Council
- **Mr. Jerry Bosworth**, President, Bosworth Air Conditioning
- **Ms. Kateri Callahan**, President, Alliance to Save Energy
- **Mr. Sam Batkins**, Director of Regulator Policy, American Action Forum

BACKGROUND

The final year of a Presidential Administration, before the start of a new Administration, has historically been an opportunity for Executive Branch agencies to push through sweeping and oftentimes controversial regulations. The sitting President is free from political constraints and is in a favorable position to push regulations with little oversight and analysis. These last-minute regulations are commonly referred as "midnight regulations." Recent studies have concluded that these rules are rushed and suffer from poor analysis, leading to an inefficient use of federal resources. Furthermore, these surges occur regardless of election outcome, and repeal of these finalized regulations is difficult.[1]

An example of midnight regulations can be seen in the promulgation of EPA's Mercury Air Toxics Standard (MATS) for power plants in the final days of the Clinton Administration. Under section 112 of the Clean Air Act, EPA triggered a requirement to propose regulations to control these emissions by December 15, 2003. Therefore, the incoming Bush Administration

[1] http://mercatus.org/publication/beware-surge-midnight-regulations

"was under political pressure to formulate a concrete proposal for regulating emissions."[2] Due to the short deadline, no serious analysis of the costs and benefits of the proposed regulations was conducted, and key research on the effects of mercury for the standard still had not been clearly conducted.

On March 15, 2005, EPA issued the final Clean Air Mercury Rule, which established "standards of performance" aimed at limiting mercury emissions from new and existing power plants.[3] Subsequent litigation vacated the Clean Air Mercury Rule and resulted in the Obama Administration proposing MATS for power plants. In December 2014, EPA announced standards to limit mercury, acid gases and other toxic pollution from power plants. On June 29, 2015, the Supreme Court found flaws in EPA's analysis of the MATS rules because the agency did not interpret the Clean Air Act correctly when it failed to include costs when it decided that the regulations were appropriate and necessary. In response to the Supreme Court's decision, EPA is now proposing to find that the consideration of costs does not alter their original determination that it is appropriate to regulate the emissions of toxic air pollution from power plants. [4,5] In the meantime, the legal and regulatory uncertainty between the Courts and the EPA has unintended consequences for the utility industry and consumers where utilities make investments to comply with regulations that are later overturned, but the costs for these investments are passed down to consumers through higher utility bills.

The history of the MATS rule is indicative of the high cost and uncertainty that occurs when rules are promulgated in this fashion. In 2015, the Obama Administration finalized some of the most broad environmental regulations in the history of the United States – the Waters of the United States, the Clean Power Plan, and Ozone National Ambient Air Quality Standards. In the final year of this Administration, EPA is already undertaking a number of new rules that will have broad ranging impacts on the energy producing sector.

DOE has also seen an increase in promulgated regulations during the Obama Administration, with 17 energy efficiency rules finalized since 2014.[6] The Administration has released energy efficiency standards for over 40 products since 2009.[7] These standards play a significant role in achieving the greenhouse gas emissions reductions outlined in the President's wide-ranging Climate Action Plan, with DOE energy efficiency rules projected to achieve two-thirds of the CAP's reduction goal of 3 billion metric tons by 2030.[8] In 2015, DOE proposed 13 energy efficiency rules involving a wide range of consumer products, including residential

[2] http://object.cato.org/sites/cato.org/files/serials/files/regulation/2005/6/v28n2-4.pdf
[3] http://www3.epa.gov/mats/actions.html
[4] http://object.cato.org/sites/cato.org/files/serials/files/regulation/2005/6/v28n2-4.pdf
[5] http://www3.epa.gov/mats/actions.html
[6] Regulation Rodeo, "U.S. Regulatory Costs, Department of Energy" Available at http://regrodeo.com/?year%5B0%5D=2016&year%5B1%5D=2015&year%5B2%5D=2014&agency%5B0%5D=Energy
[7] Mooney, Chris, "Obama just released the biggest energy efficiency rule in U.S. history" The Washington Post. Dec, 17, 2015. Available at https://www.washingtonpost.com/news/energy-environment/wp/2015/12/17/meet-the-biggest-energy-efficiency-rule-the-u-s-has-ever-released/
[8] Office of Energy Efficiency and Renewable Energy, "Saving Energy and Money with Appliance and Equipment Standards." U.S. Department of Energy. Available at http://energy.gov/sites/prod/files/2015/12/f27/Appliance%20and%20Equipment%20Standards%20Fact%20Sheet%2012-11-15_0.pdf

boilers, conventional ovens, vending machines, battery chargers, and ceiling fan lights.[9] Last December, DOE released new standards for commercial heating and air conditioners.[10] While DOE cites long-term energy savings and greenhouse gas emissions reductions for these rules, little attention is given to the immediate cost to consumers and small business owners. DOE energy efficiency research is also increasingly focused on a systems approach, rather than improving the efficiency of individual components.[11] Further, energy efficiency gains under a systems approach means the industry must make significant, costly changes to their products. Those costs will be passed down to the American consumer.

[9] Office of Energy Efficiency and Renewable Energy, "Current Rulemakings and Notices," U.S. Department of Energy. Available at http://energy.gov/eere/buildings/current-rulemakings-and-notices

[10] U.S. Department of Energy, "Energy Department Announces Largest Energy Efficiency Standard in History" December 17, 2015. Available at http://energy.gov/articles/energy-department-announces-largest-energy-efficiency-standard-history

[11] Energy Saver. "Whole-House Systems Approach" Available at http://energy.gov/energysaver/whole-house-systems-approach

Chairman SMITH. The Committee on Science, Space, and Technology will come to order. Without objection, the Chair is authorized to declare recesses of the Committee at any time.

Welcome to today's hearing entitled "Midnight Regulations: Examining Executive Branch Overreach." I'll recognize myself for five minutes and then the Ranking Member for her opening statement.

President Obama has rushed through many costly and burdensome regulations over the last seven years. These include the ozone National Ambient Air Quality Standards, the Waters of the United States, and the Clean Power Plan. The Obama Administration shows no signs of slowing down and no doubt will continue to pursue its partisan and extreme agenda, regardless of the price to the American people.

The speed at which these regulations are being finalized provide little certainty that these rules are based on a sound and transparent review of the underlying scientific data and analysis. The President's regulatory overreach will cost billions of dollars, cause financial hardship for American families, and diminish the competitiveness of American employers, all with no significant benefit to climate change, public health, or the economy.

According to the American Action Forum, regulatory costs topped $197 billion in 2015. This is a cost of over $600 for every American citizen. From 2016 alone, the Obama Administration has proposed another $98 billion in regulatory costs. According to AAF's analysis, my home State of Texas is one of the hardest hit by these burdensome regulations.

Despite heavy and growing public opposition to these proposals, the Obama Administration is actively willing to commit the United States to costly new regulations that will do nothing to improve the environment but will negatively impact economic growth. The Clean Power Plan and the Waters of the United States rule are just more of the EPA's attempts to expand its jurisdiction and increase its control over Americans. Congress voted against these rules through the Congressional Review Act last month. And the governors of most states continue to challenge overreaching regulations in court.

Yesterday, the Supreme Court blocked the Administration's rules to limit greenhouse gas emissions from power plants. The Court's ruling confirms that this rule overreaches EPA's authority.

But nothing seems to deter President Obama from achieving his extreme and unconstitutional climate agenda. Now, in an attempt to solidify his legacy before he leaves office, the President plans to rush through even more regulations. In the past year, the Department of Energy proposed 15 new energy efficiency standards, compared with just five energy efficiency standards proposed between 2009 and 2012. The DOE now works to issue costly energy efficiency rules on everything from household appliances to vending machines, including ceiling fans, air-conditioning and heating equipment, and residential boilers.

We should all be concerned about the process the EPA uses to reach their regulatory conclusions. The agency rushes to enact environmental regulations without thorough, public review of the data used to justify these rules. This hearing provides yet another example of why legislation like the Secret Science Reform Act and

the Science Advisory Board Reform Act are important checks on regulatory overreach. We should require more fairness, transparency, and public engagement in the rulemaking process. The President should not rush scientific analysis to appease his political supporters.

We all support energy efficiency and a clean environment. The air we breathe is significantly cleaner and will continue to improve due to the development of new technologies. Basic research and development will continue to lead the way to energy solutions. This research should be allowed to mature so the private sector can transition new technologies into the market before the federal government sets new energy efficiency and environmental standards. There may be serious economic consequences if the EPA and the DOE rush forward with these proposed regulations. The cost is certain but the benefits are not.

Today's witnesses will discuss how regulatory burdens fall disproportionately upon small businesses and negatively impact economic productivity. Small businesses, like individual Americans, ultimately pay for these regulations. Higher prices for goods and services, combined with reduced economic activity, hinder private sector innovation and cause businesses to struggle to stay open.

These proposed regulations will have an even greater adverse impact on those who live on fixed incomes, such as the elderly and the poor, who are the most vulnerable to increases in the price for basic necessities like electricity and heat. More should be done to hold this Administration accountable. We must cut regulatory red tape and put America back on a path to growth and prosperity.

For this reason, I am pleased that the Speaker has selected the Science Committee to help lead a taskforce to reduce costly and unnecessary regulatory burdens. Rushed regulations in a President's last year are bad for the American economy and the American people. We can't afford to rush through regulations with little substantive environmental benefit and heavy costs to our economy.

[The prepared statement of Chairman Smith follows:]

COMMITTEE ON
SCIENCE, SPACE, & TECHNOLOGY
Lamar Smith, Chairman

For Immediate Release
February 10, 2016

Media Contact: Zachary Kurz
(202) 225-6371

Statement of Chairman Lamar Smith (R-Texas)
Midnight Regulations: Examining Executive Branch Overreach

Chairman Smith: President Obama has rushed through many costly and burdensome regulations over the last seven years. These include the ozone National Ambient Air Quality standards, the Waters of the United States, and the Clean Power Plan. The Obama administration shows no signs of slowing down and no doubt will continue to pursue its partisan and extreme agenda, regardless of the price to the American people.

The speed at which these regulations are being finalized provide little certainty that these rules are based on a sound and transparent review of the underlying scientific data and analysis. The president's regulatory overreach will cost billions of dollars, cause financial hardship for American families, and diminish the competitiveness of American employers, all with no significant benefit to climate change, public health, or the economy.

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Despite heavy and growing public opposition to these proposals, the Obama administration is actively willing to commit the U.S. to costly new regulations that will do nothing to improve the environment but will negatively impact economic growth. The Clean Power Plan and the Waters of the United States rule are just more of the EPA's attempts to expand its jurisdiction and increase its control over Americans. Congress voted against these rules through the Congressional Review Act last month. And the governors of most states continue to challenge overreaching regulations in court. Yesterday, the Supreme Court blocked the administration's rules to limit greenhouse gas emissions from power plants. The Court's ruling confirms that this rule overreaches EPA's authority.

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There may be serious economic consequences if the EPA and the DOE rush forward with these proposed regulations. The cost is certain but the benefits are not. Today's witnesses will discuss how regulatory burdens fall disproportionately upon small businesses and negatively impact economic productivity. Small businesses, like individual Americans, ultimately pay for these regulations. Higher prices for goods and services combined with reduced economic activity hinder private sector innovation and cause businesses to struggle to stay open.

These proposed regulations will have an even greater adverse impact on those who live on fixed incomes, such as the elderly and the poor, who are the most vulnerable to increases in the price for basic necessities like electricity and heat. More should be done to hold this administration accountable. We must cut regulatory red tape and put America back on a path to growth and prosperity.

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###

Chairman SMITH. That concludes my opening statement. And the Ranking Member, the gentlewoman from Texas, is recognized for hers.

Ms. JOHNSON OF TEXAS. Thank you very much, Mr. Chairman.

This hearing is unfortunately not a surprise. It fits a clear and constant and consistent pattern on this committee, one that ignores the important work that actually falls under the Committee's jurisdiction and instead attacks the Federal Government's legitimate and necessary role in helping to ensure that the citizens of the Nation are protected from public health threats and environmental dangers.

It may be fruitless to remind us of this, Mr. Chairman, but the Committee has little if no jurisdiction over the regulations likely to be discussed today. And, while you and your colleagues may disagree with me, I think our time would be better spent on hearings that advance the Nation's research, innovation, and manufacturing enterprises.

Nevertheless, today, we will undoubtedly hear again the same tired rhetoric from the majority dismissing the need and value of regulations. The notion that Federal regulations are not necessary because private industry would never harm the financial interests or health of the public is simply false. Federal regulations protect us from public health hazards, and our children from unsafe products, communities from environmental dangers, and families from financial collapse. Federal regulations have played an important role in curbing the tobacco industry's past practices of marketing their knowingly harmful products to children, and Wall Street investment practices led to the 2008 financial crisis with dire economic consequences for millions of Americans.

Federal regulations are not necessary or appropriate in every instance or for every issue. However, I believe they are a critical tool in many instances in helping to improve our health, make our children safer, and prevent deadly disasters. For example, the lead contamination crisis in Flint, Michigan, is a clear example of the need for rigorous implementation of federal regulations and standards, not pulling back.

Similarly, an ongoing massive methane gas leak in California is continuing to foul the environment and endanger the safety of the public's health. No federal regulation currently addresses the identification or repair of methane gas leaks across this country, but perhaps federal regulations could have helped prevent the Southern California Gas Company's leak or the 1,724 significant natural gas incidents that have claimed the lives of 79 people and injured 396 others between 2010 and 2015.

I believe that the regulations proposed by this Environmental Protection Agency and the Department of Interior to help detect and repair of methane leaks are a positive first step. I hope we can agree that issues like the methane gas leak in California should be thoroughly investigated to identify measures to prevent them from occurring in the future.

That is why I am asking GAO, the Government Accountability Office, to investigate the Southern California Gas Company leak where the continuing release of methane has forced thousands from their homes and posed a significant threat to public health. There

are serious unanswered questions surrounding this leak and the safety and operation of these pipelines in general, which are far more worthy of this committee's time and consideration than today's hearing.

In particular, this committee has a role to play in the technical standards and pipeline safety research governing the country's natural gas infrastructure. Mr. Chairman, I hope you will join me in requesting this review.

In closing, I look forward to the day when this Congress and this committee will step back from its counterproductive opposition to efforts by EPA and DOE and other federal agencies who are just trying to carry out their statutorily mandated missions. They may not always get everything exactly right, nor do we, but trying to prevent them from doing their job at all is not a good use of our time. Instead of seeking to score political points by undermining their important work, we should come together in a productive way to advance our economy, a cleaner environment, and a healthier public.

[The prepared statement of Ms. Johnson of Texas follows:]

OPENING STATEMENT
Ranking Member Eddie Bernice Johnson

House Committee on Science, Space, and Technology
Full Committee
"Midnight Regulations: Examining Executive Branch Overreach"
February 10, 2016

Thank you. Mr. Chairman, this hearing is, unfortunately, not a surprise. It fits a clear and consistent pattern on this Committee -- one that ignores the important work that actually falls under the Committee's jurisdiction and instead attacks the federal government's legitimate and necessary role in helping to ensure that the citizens of this nation are protected from public health threats and environmental dangers. It may be fruitless to remind you of this, Mr. Chairman, but the Committee has little, if no, jurisdiction over the regulations likely to be discussed today. And while you and your colleagues may disagree with me, I think our time would be better spent on hearings that advance the nation's research, innovation, and manufacturing enterprises.

Nevertheless, today we will undoubtedly hear again the same tired rhetoric from the Majority, dismissing the need and value of regulations. The notion that federal regulations are not necessary because private industry would ***never*** harm the financial interests or health of the public is simply false. Federal regulations protect us from public health hazards, our children from unsafe products, communities from environmental dangers, and families from financial collapse. Federal regulations have played an important role in curbing the tobacco industry's past practices of marketing their knowingly harmful products to children and Wall Street investment practices that led to the 2008 financial crisis with dire economic consequences for millions of Americans. Federal regulations are not necessary or appropriate in every instance, for every issue. However, I believe they are a critical tool in many instances in helping to improve our health, make our children safer, and prevent deadly disasters.

For instance, the lead contamination crisis in Flint, Michigan is a clear example of the need for rigorous implementation of federal regulations and standards, not pulling back. Similarly, the ongoing massive methane gas leak in California is continuing to foul the environment and endanger the safety of the public's health. ***No*** federal regulations currently address the identification or repair of methane gas leaks across this country. But perhaps federal regulations *could* have helped prevent the Southern California Gas Company's leak, or the 1,724 significant natural gas incidents that have claimed the lives of 79 people, and injured 396 others, between 2010 and 2015. I believe that the regulations proposed by the Environmental Protection Agency and the Department of Interior to help detect and repair methane leaks are a positive first step.

I hope we can agree that issues like the methane gas leak in California should be thoroughly investigated to identify measures to prevent them from occurring in the future. That is why I am asking the Government Accountability Office to investigate the Southern California Gas Company leak, where the continuing release of methane has forced thousands from their homes and poses a significant threat to public health. There are serious unanswered questions surrounding this leak, and the safety and operation of these pipelines in general, which are far more worthy of this Committee's time and consideration than today's hearing. In particular, this Committee has a role to play in the technical standards and pipeline safety research governing the country's natural gas infrastructure. Mr. Chairman, I hope that you will join me in requesting this review.

In closing, I look forward to the day when this Congress and this Committee will step back from its counterproductive opposition to efforts by the EPA, DOE, and other federal agencies who are just trying to carry out their statutorily mandated missions. They may not always get everything exactly right, but trying to prevent them from doing their job at all is not a good use of our time. Instead of seeking to score political points by undermining their important work, we should come together in a productive way to advance our economy, a cleaner environment, and a healthier public.

Finally, Mr. Chairman, before I yield back I'd like to enter into the record a letter from 600 physicians, nurses, and other health professionals who support EPA's proposed rule to reduce methane emissions. Thank you.

Ms. JOHNSON OF TEXAS. And finally, Mr. Chairman, before I yield back, I'd like to enter into the record a letter from 600 physicians, nurses, and other health professionals who support EPA's proposed rule to reduce methane emissions.

Chairman SMITH. Okay. Without objection, that will be part of the record.

[The information appears in Appendix II]

Chairman SMITH. And I thank you——

Ms. JOHNSON OF TEXAS. Thank you very much. And I must say that I will be departing the Committee for a markup in another committee.

Chairman SMITH. Okay. Thank you, Ms. Johnson.

Let me introduce our witnesses today. And our first one is Ms. Karen Kerrigan, President and CEO of the Small Business and Entrepreneurship Council. Ms. Kerrigan's leadership and advocacy for nearly a quarter of a century have helped foster U.S. entrepreneurship and global small business growth. She has been appointed to numerous federal advisory boards, including the National Women's Business Council. In addition, she is a founding member of the World Entrepreneurship Forum and is a board member of the Center for International Private Enterprise. In 2009, Ms. Kerrigan was awarded the Small Business Advocate of the Year by the New York Enterprise Report. Ms. Kerrigan received her bachelor's degree in political science from the State University of New York System.

I will now yield to the gentleman from Texas, Mr. Weber, to introduce our next witness, Mr. Jerry Bosworth.

Mr. WEBER. Thank you, Chairman Smith. I'm pleased to introduce our third witness and fellow Texan Mr. Jerry Bosworth, President of Bosworth Air Conditioning and Vice Chairman of the Air Conditioning Contractors of America. Bosworth Air Conditioning is a family-owned and -operated business of ten employees, which was founded in 1959. Jerry was just a young whippersnapper back then. Bosworth A.C. specializes in both installation and service and replacement of both residential and commercial systems. Jerry served as Chairman of ACCA, Air Conditioning Contractors Association, and of the Members Services Committee. Prior to being elected to the National Board, he donated his time and energy as a member of the local contracting association, TACCA, or we would call it also Houston's Air Conditioning Contractors Association, and served on the board of his state contracting association.

Mr. Chairman, we are very grateful to have you here today. He's got one of the oldest and, I might add, finest air-conditioning companies next to Weber's Air and Heat on the Gulf Coast. So I'll——

Chairman SMITH. Waiting for that.

Mr. WEBER. So a free plug now, but, Jerry, I'll send you an invoice later. Welcome. We're glad to hear.

Chairman SMITH. Thank you, Mr. Weber.

Our next witness is Ms. Kateri Callahan, President of the Alliance to Save Energy. Ms. Callahan also serves as a board member for the Keystone Energy Board and the Business Council for Sustainable Energy. She also serves on advisory councils to the U.C. Davis Policy Institute on Energy, Environment, and the Economy; and Duke University's Center for Energy Development and the Global Environment. Prior to joining the Alliance, Ms. Callahan

served as the President of the Electric Drive Transportation Association. She received her bachelor's degree in political science from the University of Louisville.

Our final witness is Mr. Sam Batkins, Director of Regulatory Policy at the American Action Forum. Mr. Batkins focuses his research on examining the rulemaking efforts of administrative agencies in Congress. His work has appeared in the Wall Street Journal, the New York Times, the Hill, Reuters, and the Washington Post, among other publications. Prior to joining the forum, Mr. Batkins worked at the U.S. Chamber of Commerce, the Institute for Legal Reform, and the National Taxpayers Union. Mr. Batkins received his bachelor's degree in political science from the University of the South and his law degree from Catholic University.

We welcome you all, look forward to your testimony. And, Ms. Kerrigan, if you'll begin.

TESTIMONY OF MS. KAREN KERRIGAN,
PRESIDENT AND CEO,
SMALL BUSINESS &
ENTREPRENEURSHIP COUNCIL

Ms. KERRIGAN. Great. Well, thank you, Chairman Smith. It's a pleasure to be here. Thanks. Good morning to all the committee members. And it's—again, thank you for the invitation. This is a very important issue for our members in the small business sector of the economy.

It should come as no surprise to members of the committee that many small businesses have concerns about federal regulations and the process by which the rules are made. A host of new rules and ones yet to come are piling on at a time when small businesses continue to struggle in a very tough economy. Complying with existing regulations and navigating new rules takes time and significant resources. Business owners are now looking at what's currently in the pipeline, which only perpetuates the uncertainty that's behind less risk-taking and growth.

The period between the recession until now has been challenging for small businesses. A Bank of America survey conducted midyear last year found that only one in five small business owners say they have completely recovered from the Great Recession. So it is times such as these that federal agencies and government policies need to be especially sensitive about how proposed actions impact entrepreneurship and small business growth. After all, even given their struggles and challenges, small businesses and startups still remain the engine of job creation and innovation in our nation.

And it's that understanding that was behind the development and passage of laws meant to protect small businesses from excessive regulation and provide them with some voice in the regulatory process. But unfortunately, there has been a breakdown in the process and responsiveness to their concerns.

So as we enter a period where there will be a change of Administrations, and historically, this has been a time where there is an uptick in new rulemakings, I think you can empathize with the concerns of small business owners who feel that their voice and concerns can be minimized even further. We are concerned that an

anticipated regulatory rush could lead to more shortcuts in a process that is meant to look out for small business owners.

The Mercatus Center analyzed data during the midnight regulatory period across Administrations from 1975 to 2006 and found regulatory analysis quality drops and regulatory oversight by the Office of Information and Regulatory Affairs weakens. As a result, federal agencies produce ineffective regulation, and these rules are more likely to be more costly.

So this is why we do hope there can be some actions, some reforms that will improve the process and make it more accountable and inclusive for the small business community because small businesses are disproportionately impacted by regulation, and I would add more so by environmental regulation. A National Association of Manufacturers' report details the disproportionate cost, which I've included in my written testimony.

EPA's possible activity is of concern given the Agency's history of improper certification of proposed rules when it comes to small business impact. On several major rulemakings, the SBA's Office of Advocacy made it clear that EPA's certification of rules did not comply with the Regulatory Flexibility Act. This was the case, for example, with greenhouse gas rules and the Waters of the United States Rule. In each of these cases, EPA's own analysis contradicted its certification.

The bottom line is that small businesses remain very concerned about what's ahead in 2016 on the federal regulatory front. With an economy that lacks a strong traction and with indications that economic growth may slow further, regulations that raise compliance and energy costs and make it more difficult to compete only create more headwinds for small businesses.

But I am somewhat optimistic. Thankfully, both sides of the political aisle recognize that we have a regulatory problem, a process problem as well. There are solid bipartisan solutions that have been proposed in the House and Senate that begin to chip away at the lack of accountability and to provide small businesses a greater voice and more protection in the regulatory process. And I look forward to discussing these with committee members. Thank you.

[The prepared statement of Ms. Kerrigan follows:]



Testimony of

Karen Kerrigan
President & CEO
Small Business & Entrepreneurship Council

Midnight Regulations: Examining Executive Branch Overreach

Committee on Science, Space and Technology
United States House of Representatives

The Honorable Lamar Smith, Chairman
The Honorable Eddie Bernice Johnson, Ranking Member

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Protecting Small Business, Promoting Entrepreneurship

Chairman Smith, Ranking Member Johnson and members of the committee, thank you for your invitation to testify on the issue of midnight regulations. My name is Karen Kerrigan and I am president & CEO of the Small Business & Entrepreneurship Council (SBE Council).

For nearly 24 years, SBE Council has worked to support policies and initiatives that promote entrepreneurship and small business growth. SBE Council is a nonprofit, nonpartisan advocacy, research and education organization with 100,000 supporters, members and activists throughout the United States. We are dedicated to strengthening the policy ecosystem and economic climate to enable healthy entrepreneurship and strong business growth.

Regulation and the threat of new regulation continue to be a major issue of concern for our members. Small businesses are challenged by having to absorb new regulatory costs as the economy continues to limp along at the same time revenue growth in their firms remains generally weak. The heightened level of regulatory activity obviously creates uncertainty for entrepreneurs, which limits risk-taking, investment and expansion. Another year of too much regulation from Washington means another year of lackluster growth for the economy. This is not what small business owners are hoping for or need.

A new survey released by OnDeck Capital on February 5, finds that the top issue for small business owners is the economy (56.6 percent) – and specifically "the need for economic growth" as "crucial for their firms." Not surprisingly, concerns about tax policy, health care costs, and new or changing regulations round out the list. A stronger economy is especially critical for our small businesses. Beyond keeping up with costs and the competition in a tough economy, a mid-year report in 2015 from Bank of America found that only one in five small business owners say they have completely recovered from the Great Recession (Bank Of America Small Business Owner Report, Spring 2015). That's more than a seven-year stretch of making ends meet, while navigating market changes, new technologies, capital access issues, human capital concerns and day-to-day challenges. New regulatory burdens have only added to pressures. And from our perspective, excessive federal regulation is a key reason why the economy has experienced lackluster growth. In order to have robust growth, strong investment, quality job

creation and opportunity for more Americans, our entrepreneurs and small businesses have to move beyond survival-mode and the drag of the Great Recession, and towards vigorous growth.

Concerns About "Midnight Regulation"

As it is, we have largely found that the concerns of small businesses in the federal rulemaking process appear to not matter, are routinely ignored, or regulators claim small businesses will not be economically impacted by major rules where in fact the impact is quite clear. The Environmental Protection Agency's (EPA's) Waters of the U.S. (WOTUS) regulation is case in point. In the agency's fantasy analysis, the EPA certified that small businesses would not be impacted or subject to any new requirements of the rule. But in reality there is no way that small entities are going to be able to circumvent the conservative $158 million annual costs (EPA's estimate) that result from the newly required permits under the rule. In other words, the EPA's own analysis undercut their claim that the rule would not have an impact on small firms. Unfortunately, the entire process surrounding the WOTUS rule seemed rigged from the start, and represents why small businesses feel hopeless about the regulatory process. As they deal with the cost of new regulations in survival mode, they see many more regulations in the pipeline that will impact almost every aspect of their business operations.

From our perspective, the regulatory process is broken and we do not have faith that it will suddenly become more accountable, transparent and responsive to small businesses with a 2016 push by the Administration to complete its policy agenda through rulemakings and other means. In fact, the regulatory rush will likely lead to more shortcuts, flawed analysis and less transparency during this period. The Mercatus Center analyzed data from across Administrations (1975-2006) and found midnight regulations produced exactly this type of outcome: "During the surge, the agencies' regulatory analysis quality drops and regulatory oversight by the Office of Information and Regulatory Affairs (OIRA) weakens. As a result, federal agencies produce ineffective regulation and waste public resources." (Beware the Surge of Midnight Regulations, July 2012.)

Another Mercatus Center study noted the cost impact of this regulatory drive, as "rushed midnight regulations proposed during the second half of a presidential election year have lower-quality regulatory analysis, and agencies are less likely to use the analysis to make decisions about the regulation. These regulations are more likely to be ineffective or excessively costly." (Midnight Regulation: Decisions in the Dark? August 2012.)

And make no mistake; these costs are significant for businesses and our economy. Especially small businesses and manufacturers that are disproportionately impacted by regulation – and more so by environmental regulation. The National Association of Manufacturers (NAM) reports that small manufacturers with 50 employees or less pay an estimated $34,671 per employee per year to comply with federal regulation. Environmental regulatory costs account for $20,361 of the total. And for all other firms with 50 employees or less, the full regulatory burden per employee is $11,724 with environmental regulatory costs totaling $3,574. (The Cost of Regulation to the U.S. Economy, Manufacturing and Small Business, September 2014.)

EPA's possible midnight regulatory activity is of particular concern given the agency's history of improper certification of proposed rules when it comes to small business impact. On several high-profile major rulemakings, the SBA's Office of Advocacy made it clear that EPA's certification of rules did not comply with the Regulatory Flexibility Act. This was the case for example, with greenhouse gas rules, a pesticide rule, and of course the WOTUS rule. In each of these cases, EPA's own analysis contradicted its certification.

Small Businesses Dominate Most Sectors

Regulators need to approach each rulemaking with an understanding that small businesses make up the largest share of businesses in almost every sector of our economy. As noted above, this reality is simply not embedded into the thinking of most regulators, especially at the EPA that seems to find justification for dismissing the hard facts or their own analysis.

For example, the energy industry, which is the target of many EPA rules, is largely populated by small to mid-size businesses. According to the U.S. Census Bureau (2012):

• 90.7% of employer firms among oil and gas extraction businesses have less than 20 workers, and 98.5% less than 500 workers;

• 78.1% of firms among drilling oil and gas wells businesses have less than 20 workers, and 97.2% less than 500 workers;

• 81.5% of firms among support activities for oil and gas operations businesses have less than 20 workers, and 98.6% less than 500 workers;

• 60.5% of firms among oil and gas pipeline and related structures construction businesses have fewer than 20 workers, and 95.5% less than 500 workers;

• 54.7% of firms among oil and gas field machinery and equipment manufacturing businesses have less than 20 workers, and 91.4% less than 500 workers.

The manufacturing sector, as noted previously, is also dominated by small businesses with 193,108 of firms within the industry (out of 256,363 total) having fewer than 20 employees, according to NAM. Another 47,443 have 20 to 99 employees, and 12,186 have 100-499 employees. Again, manufacturing is disproportionately hit by environmental regulation, and will certainly feel the impact of newer EPA regulations recently finalized, as well as others in the pipeline to reduce greenhouse gas emissions.

Higher compliance and energy costs put smaller firms at a disadvantage to bigger businesses. Smaller businesses simply cannot absorb these costs as "easily" as larger businesses, which makes growth, job creation, and survival much more difficult. So, in addition to competitive pressures from larger businesses and firms in the international marketplace, a costly regulatory environment works against the very small businesses that are needed to enhance our nation's innovative and job-creating capacity.

Again, the NAM study on regulation demonstrates that the per-employee cost of regulation decreases in bigger businesses, and dramatically so. For example, as noted above, while small firms with less than 50 employees face per-employee regulatory costs of $34,671 (with environmental regulations making up $20,361 of those costs), the total per-employee cost of regulation for firms with 100 employees or more is $13,750 (with costs associated with environmental regulation being $6,239.)

The bottom line is that small businesses remain very concerned about what's ahead in the coming year on the federal regulatory front. With an economy that lacks strong traction, and with indications that economic growth may slow further, regulations from Washington that raise compliance and energy costs and make it more difficult to compete only create more headwinds and uncertainty for small businesses.

SBE Council will be keeping an eye out on all federal regulatory activity in 2016, including those related to energy and the environment because these impact so many of our members. For example, continued efforts underway at the EPA to reduce greenhouse gas emissions will have widespread impact. New initiatives talked about in the media related to "light pollution" will impact small businesses across the board, and we will be on the lookout for regulatory activity that comes through other means like guidance and general statements of policy.

The Competitive Enterprise Institute, which author Wayne Crews calls "regulatory dark matter", has comprehensively reported upon this "off book" activity in a new study. (Mapping Washington's Lawlessness 2016: A Preliminary Inventory of Regulatory Dark Matter, December 2015.) For years our members have warned us about the uptick in federal agency actions outside of the official regulatory process – that is, guidance letters, advisory notices interpretive rules, general statements of policy – which lead to new rulemakings, but where the public has no input. So, in addition to the potential threat of midnight regulation and new regulatory activity that ignores small business impact despite significant public comment by the small business community pointing this out, regulators could simply issue guidance or interpretive rules, where Administrative Procedure Act rules do not generally apply.

Conclusion

The gamesmanship that comes with midnight regulation is really appalling in light of the massive regulatory burden faced by small businesses and our economy. It is simply not acceptable that any Administration game the system to ensure their agenda is complete before the stroke of midnight, particularly if the market is not broken or the rush to regulate is not called for. Such political regulation is why the public is so cynical about our government institutions, including the regulatory process.

In a State of Regulation survey released by SBE Council's Center for Regulatory Solutions in 2014, 67 percent of the public said that regulations "mostly hurt" America's competitiveness in the world, and 66 percent believe regulations "mostly hurt" people like them. An overwhelming number, 84 percent, believe too many special interests are involved in shaping government regulations; and 72 percent believe that regulations are created in a "secretive" rather than "open" process. Furthermore, 68 percent say regulations are created by "out-of-touch" people, with 64 percent agreeing that regulations do not consider "real world impact." In terms of what level of government they trust most to regulate business, 74 percent say state (41 percent) and local (33 percent) government, while 17 percent believe the federal government. (America the Regulated Survey, February 2014.)

Thankfully, both sides of the political aisle recognize that we have a regulatory problem. There are solid bipartisan solutions that have been proposed in the House and Senate that begin to chip away at unaccountability, lack of transparency and giving small businesses a greater voice in the regulatory process. Presidential candidates out on the campaign trail are hearing from voters and small businesses about over regulation, and the candidates are responding. Democrat candidate and Former Secretary of State Hillary Clinton has said the climate for small business has "become more difficult, more expensive" with "more red tape, unnecessary regulation," which has dampened economic growth. (Hillary Clinton Talks Middle Class Roots in Pitch to Iowa Small Business Owners, Washington Post, April 15, 2015.)

Again, and as a reminder, the effect of energy and environmental regulations pile on top of other regulatory costs. Small businesses are facing new costs and are looking at more regulation in the future that will affect the workplace and human capital costs, health coverage costs, access to capital and finance, employee benefits, and government contracting to touch upon just a few key areas. The current one is not one that favors robust entrepreneurship. Indeed the World Bank Doing Business report puts the United States at 46th in the world in terms of ease of starting a business.

Thank you for your attention and interest on the issue of midnight regulation and the regulatory burden on small businesses in general. I look forward to our discussion and your questions.

Karen Kerrigan

Bio

Karen Kerrigan's leadership and advocacy for nearly a quarter of a century have helped foster U.S. entrepreneurship and global small business growth. She is president & CEO of the **Small Business & Entrepreneurship Council** and serves as the group's chief advocate. Kerrigan engages regularly with members of the U.S. Congress and meets with the President's advisors and cabinet members on the key issues impacting entrepreneurs and the economy. She has been appointed to numerous federal advisory boards including the **National Women's Business Council**. Kerrigan has been called America's "entrepreneurial envoy" and "small business ambassador" for her extensive work overseas. Her extensive work in the Mideast and North Africa has helped women entrepreneurs build sustainable, influential business associations that have led to important policy changes for women in this region of the world. She is a founding member of the **World Entrepreneurship Forum,** and is a board member and former chair of the **Center for International Private Enterprise (CIPE)**. In 2014, 2013, 2012 and 2011 she was named a Top 100 Champion Small Business Influencer. CEO World Magazine named Kerrigan a Top Ten Power Woman in Crowdfunding. In November of 2009 she was presented with the "Small Business Advocate of the Year" award by the **NY Enterprise Report**. *Inc. Magazine* named Kerrigan to its small business "Best Friends in D.C." list as a "**power broker and activist**" with "serious clout" for entrepreneurs; *Fortune Small Business* to its "Power 30"; and *The Hill* newspaper to its "most influential small business" list (2006) describing her as "the hardest working woman in show business." Born in New York, she has lived in Northern Virginia for 25 years.

Chairman SMITH. Thank you, Ms. Kerrigan.
And, Mr. Bosworth.

TESTIMONY OF MR. JERRY BOSWORTH, PRESIDENT, BOSWORTH AIR CONDITIONING

Mr. BOSWORTH. Yes. Is this still on? There we go. I'm sorry.

Chairman Smith, Ranking Member Johnson, and members of the committee on energy, thank you for the opportunity to testify before you today. My name is Jerry Bosworth, and I am the President of Bosworth Air Conditioning and Heating in Galveston, Texas.

Bosworth Air Conditioning and Heating has been selling, installing, and servicing Galveston County's residential and commercial comfort systems since 1959. I am here today representing the interests of ACCA, the Indoor Environmental and Energy Efficiency Association. ACCA is the leading national association representing the technical, educational, and policy interests of small business contractors that design, install, and maintain residential and commercial heating and cooling systems. But I am also before you today representing more than the 1 million Americans employed by the manufacturers, distributors, contractors—and contractors of the HVACR industry.

Today, I would like to highlight some of the concerns related to the uptick in the number of rules and regulations related to the energy and environmental regulations the Department of Energy and the Environmental Protection Agency have had significant adverse impact on manufacturers, distributors, and contractors.

From the Department of Energy, we have seen an aggressive push to increase the energy efficiency standards for residential and commercial heating, ventilation, air-conditioning, refrigeration equipment, as well as water heaters. At the time—at the same time, we have been—there have been problems with the test procedures used to rate some of the equipment that makes it more difficult to achieve these higher standards, affecting a double impact.

As an example, the Department of Energy recently proposed a set of new minimum national energy conservation standards for residential natural gas furnaces at 92 percent AFUE, a ratio that describes how efficiency—how efficiently the appliance converts gas to heat. According to DOE's own economic models, nearly 1/3 of all homeowners in 19 southern States and territories would never see a positive payback from replacing their existing furnace; 12 percent of homeowners in the 33 northern States, a similar prospect.

In proposing to set this standard, DOE is effectively eliminating one type of furnace technology that represents half of the current models shipped today. I have installed a lot of furnaces in my lifetime, but only once have I installed a furnace that approached the standard DOE wants to set as the basic model for all States.

Higher efficiency furnaces like the ones DOE wants to mandate as a minimum are not appropriate in all parts of the country, not even the North. This is because furnaces that have an AFUE ratio equal or above 90 percent have special requirements that can only add thousands of dollars to the installation cost. This may force the homeowners to repair or maintain an older, inefficient model instead of upgrading, or it can drive many homeowners in areas of

low heat load to opt for a heat pump, driving up the utility costs, leading to more fossil fuel emissions at the energy plant.

On Section 608, 608, the production, use, and handling of hundreds of refrigerant compounds that make air-conditioning and refrigeration possible are controlled and regulated by the EPA. Many have found it—many of these have been found to harm the ozone layer or have a higher global warming potential if they are released into the atmosphere. EPA rules requires anybody who works on an air-conditioning system to take a certification test to obtain their 608 card, named after Section 608 of the Clean Air Act, prohibiting the release of most refrigerants while performing any service or maintenance.

In order to comply with these rules, the service technician must be trained, have the required equipment, take the extra time to properly evacuate the entire refrigerant into an appropriate container before performing any service work to the sealed system. ACCA has no problem with these rules, but unfortunately, there are a lot of individuals who claim to be professional contractors who skirt these rules and are never caught. The bottom line—the bottom-feeders take advantage of a lax enforcement and undermine our industry.

So we think that better enforcement of—we would like to see better enforcement of the Section 608 rule. Unless significant changes are made to Section 608 program through increased enforcement, it cannot accomplish its mission to protect the environment and should be abandoned.

Lastly, I would like to bring to the Committee's attention an important gap in existing regulatory scheme for residential equipment. According to a 2013 National Institute of Standards and Technology study, there are substantial equipment efficiency losses due to poor installation practices typically due to duct leakage, refrigerant undercharge/overcharge, low indoor airflow, oversized equipment, and undersized ductwork.

For years, ACCA has championed the need for quality installations in the HVACR contracting business, and DOE seems to ignore our pleas.

So I look forward to any questions from the Committee. Thank you much.

[The prepared statement of Mr. Bosworth follows:]

Testimony of Jerry Bosworth

President,

Bosworth Air Conditioning and Heating, Inc.,

Galveston, Texas

And

Vice Chairman

ACCA – The Indoor Environment and Energy Efficiency Association

Board of Directors



Chairman Smith, Ranking Member Johnson, and members of the committee, my name is Jerry Bosworth and I am the President of Bosworth Air Conditioning and Heating, Inc., in Galveston, Texas. Our company, and I say "our" because Bosworth Air Conditioning and Heating is a family business, has been selling, installing, and servicing residential and commercial comfort systems in Galveston County since 1959. Over the years we have grown to the point where today we employ 8 technicians and support staff.

I want to thank you for allowing me to testify today on behalf of ACCA – the Indoor Environment and Energy Efficiency Association. ACCA is the leading national association representing the technical, educational, and policy interests of the small business contractors that design, install, and maintain residential and commercial HVACR systems. However, in many ways, I am before you representing the more than 1,000,000 Americans employed by the manufacturers, distributors, and contractors of the HVACR industry.

This morning I want to highlight some of the difficulties facing the HVACR industry as a result of environmental regulations and appliance standards issued by the Department of Energy, the U.S. Environmental Protection Agency, and other federal agencies.

An aggressive approach in the last few years to increasing the energy conservation standards for residential central air conditioners, heat pumps, and furnaces, commercial refrigeration equipment, walk-in coolers and freezers, residential hot water heaters, and other HVACR equipment has impacted more than just equipment manufactures. It has impacted small business contractors and their customers. In some cases, proposed changes to the test procedures used to rate this equipment has been finalized after the new standard has been set, contrary to the Energy Policy and Conservation Act.

These rules and regulations may directly impact the manufacturers, but they move down the supply chain to impact the distributors, contractors, and homeowners and building owners.

In other areas, regulatory changes to the list of compounds approved as refrigerants have caused some unexpected uncertainty for HVACR contractors.

Finally, ACCA has been frustrated in our attempts to move the energy efficiency discussion beyond appliance standards to installation practices.

As an example, the Department of Energy recently proposed to set new minimum energy conservation standards for residential natural gas furnaces. Federal law requires these products to meet a standard based on metric that measures how efficiently they heat a home, similar to miles per gallon in an automobile. The standard is presented as Annualized Fuel Utilization Efficiency (AFUE) ratio, where the higher the number, the more efficient the furnace is at

converting natural gas to heat in your house. Product models available today range from 81% AFUE up to 98% AFUE.

In March, the DOE proposed to set the minimum AFUE standard at 92% nationwide starting in 2021, a level that had significant implications on the market and consumers. First, this proposed standard would eliminate half the furnaces models manufactured and installed in the market today. Second, by DOE's own economic models, nearly one third of all homeowners in 19 southern states would never see a positive payback from replacing their existing furnace. Nearly 11% of homeowners in the North region would also never save enough on their utility bills to pay for the new furnace over its lifetime.

Part of the reason is that a furnace with AFUE ratio above 90% is known as condensing furnaces and they achieve these higher efficiency levels by using advanced technologies to extract a little bit of extra heat from the combustion. Higher efficiency furnaces utilize more complicated technology, which requires more complicated installation practices in order to make it work correctly and safety. They use air from outside the house for combustion, so they need to be installed near an exterior wall. And they produce a small amount of water during operation that must be disposed of down a drain.

The 92% AFUE standard would effectively ban the manufacture and installation of non-condensing furnaces that found are in many homes today. These furnaces typically expel the waste gases and combustion fumes up through a chimney.

But condensing furnaces are not appropriate in all types of homes, especially where in the South where the heating load is low or in townhomes or rowhomes which are smaller or only have two exterior facing walls. In cases where a non-condensing furnace is already in place, retrofitting the home to address venting and condensate need of a condensing furnace can add thousands of dollars to the installation price. And that will likely force the homeowner into a repair and maintain situation.

Finally, this proposal not only eliminates the option for a non-condensing furnace, it has the potential to drive many consumers to heat pumps, driving up their utility costs and likely leading to more fossil fuel emissions at the energy plant.

When the base model furnace or central air conditioner becomes more expensive to manufacture, test, and ship, the costs must be passed down the line. Ultimately this hurts consumers and forces contractors into the proposition of offering consumer the false choice between the short sighted solution to repair and maintain old inefficiency equipment and purchasing new equipment that will never have a positive payback.

On three cases in the past four years, industry has been force to seek a remedy through the courts when the agency ignored industry concerns, relied on flawed economic assumptions, or violated the Administrative Procedures Act in promulgating a rule. In two cases, the agency settled out of court; the other case is still pending.

In other recent rulemakings, industry stakeholders elected to pursue negotiated rulemakings on pending appliance standards because the normal notice and comment period approach would likely lead to uncertain results. Contractors have been frustrated because we feel the DOE economic assumptions about installation and maintenance costs used to determine the life cycle costs are flawed.

The rulemaking process is broken and needs changes to ensure that new appliance standards designed to save energy realize those expected savings without adding unnecessary burdens to manufacturers, distributors, and contractors; and promote consumer choice and a positive payback on the investment. A standard that would negatively impact 31% of homeowners who purchase a new furnace should not be proposed.

With regard to environmental rules, our industry faces a number of regulations from the Environmental Protection Agency related to the refrigerants used for air conditioning and refrigeration.

There are hundreds of refrigerant compounds that make the magic of air conditioning and refrigeration possible. You've probably hear of heard of referred to as HCFCs or HFCs. The production, use, and handling of these compounds are controlled and regulated by the EPA because many have been found to harm the ozone layer or have a high global warming potential if they are released into the atmosphere.

The EPA requires anyone who works on an air conditioning system to take a certification test to obtain their "608 card", named for Section 608 of the Clean Air Act. Air conditioning and refrigeration systems are closed loop systems and Section 608 prohibits the release of most refrigerants while performing any service or maintenance. In order to comply with these rules, a service technician must be trained, have the required equipment (which isn't cheap), and take the extra time to properly evacuate all the refrigerant into an approved container before performing any service work.

Unfortunately there are a lot of individuals who claim to be professional contractors who skirt these rules and are never caught. These bottom feeders take advantage of a lax enforcement system and undermine the upstanding contractors who comply with the rules.

So here's something you probably didn't expect to hear today: ACCA would love to see increased enforcement of the Section 608 venting prohibition rules. Unless significant changes are made to the Section 608 program through increased enforcement, it cannot accomplish its mission to protect the environment.

ACCA also hopes for a smooth transition in the event of a future phase out of HFC refrigerants. The EPA, through the Montreal Protocol, has been slowly phasing down the production of HCFC refrigerants over the last two decades through a process of annual allocations. On two occasions in the last six years, rules outlining those allocations were delayed, causing a spike in the price of the most common refrigerant due to uncertainty about availability. We were forced

to pass those costs along to our customers, where in some cases the price of a service call tripled from one year to the next.

Finally, I want to bring to the committee's attention an important gap in the existing regulatory scheme for residential equipment.

According to a 2013 U.S. Department of Commerce's National Institute of Standards and Technology (NIST) study, there are substantial equipment efficiency losses due to poor installation practices, typically due to duct leakage, refrigerant undercharge/overcharge, low indoor airflow, and oversized equipment with undersized ductwork. Furthermore, the report shows that when two or more simultaneous faults occur, the efficiency degradations can be additive, compounding the increased consumption.

For years, ACCA has championed the need for quality installation (i.e. performance contracting) in the HVACR contractor sector. Through its own resources, ACCA has financed and developed several ANSI-recognized standards dealing with quality installation, maintenance, service, restoration and verification protocols. The "performance" standards provide stakeholders (home and building owners, utilities that offer rebates, government-entities that provide tax credits) the opportunity to achieve the desired energy efficiencies, but more importantly, to get exactly what they paid for.

Poor installation practices rob homeowners of the potential energy savings they expect. We need to look at ways to include an installation standard into the regulatory scheme for HVACR equipment. And yet our calls to get the Department of Energy to accept or recognize the QI standard have gone unanswered.

I will close by pointing out that ACCA has been a long-time and active supporter of energy efficiency and has partnered with both EPA and DOE on many initiatives to improve equipment efficiency and performance and contractor competence. ACCA believes that efficiency standards serve as an important policy tool, as long as they meet the test of being economically justified and technologically feasible.

I look forward to any questions from the committee.

Jerry B. Bosworth is President of Bosworth Air Conditioning in Galveston, TX, a family owned and operated business of 10 employees, which was founded in 1959. Bosworth AC specializes in both installation and service and replacement of both residential and commercial systems. Having lived in Galveston County for most of his life, Jerry is a Texan through and through and now brings that great style to the ACCA Board of Directors.

He has served as chairman of the ACCA Membership and Member Services Committee. Prior to being elected to the National Board, he donated his time and energy as a member of his local contracting association in Houston, and also served on the board of his state contracting association.

Chairman SMITH. Thank you, Mr. Bosworth.
And, Ms. Callahan.

TESTIMONY OF MS. KATERI CALLAHAN, PRESIDENT, ALLIANCE TO SAVE ENERGY

Ms. CALLAHAN. Thank you, Mr. Chairman, and members of the committee, for the opportunity to testify before you today. I'm going to take a bit of departure from my fellow witnesses so far and talk about the significant and very positive impacts that appliance, equipment, and vehicle efficiency standards are having on our economy.

My organization, the Alliance to Save Energy, is a nonprofit coalition that has worked for 39 years to advance energy efficiency for the economic benefits, the improvement of the environment benefits, and also to enhance our energy security.

I'm very proud of the fact that we were founded by two then-sitting Members of Congress, Hubert Humphrey, a Democrat from Illinois; and Chuck Percy, a Republican from—excuse me—Hubert Humphrey, a Democrat from Minnesota; and Chuck Percy, a Republican from Illinois.

We have jealously guarded our inherited culture of bipartisanship, and today, we count 14 sitting Members of Congress from both sides of the aisle and both sides of the Capitol as honorary members of our board. And I'd like to take this moment to note that we are very pleased that Congressman Paul Tonko, a member of this committee, is part of our august group.

Our Congressional Members are joined on our Board of Directors by leaders from business and organizations across all sectors of the economy, including manufacturers and HVAC folks. Since the birth of the Alliance, our country has made very great strides in advancing energy efficiency, and that's thanks in large measure to effective national public policies, most notably, the appliance, equipment, and vehicle efficiency standards.

Efficiency standards have proven to be the most cost-effective way of driving energy efficiency into our market. In fact, if you take together the corporate average fuel economy standards and all our appliance and equipment standards, we're shaving off the energy use equivalent to ten percent of what we consume today. And that translates into very big money savings for Americans.

Studies have shown that American businesses and consumers today are saving $800 billion every year on their energy bills. And as a country, we've doubled our energy productivity over the past three decades. That is to say that we are creating twice as much gross domestic product today than we did—using half of the energy than we did in 1980.

We've done this once, and at our organization we believe we can do it again. The Alliance has articulated the goal of doubling energy productivity once again by 2030. If we do it, the benefits to our country are simply transformative. We would recycle $327 billion into our economy from energy cost savings. We would create 1.3 million new jobs, and we'd reduce the need for imported energy to represent less than seven percent of our total demand. But we can only achieve this goal with a strong foundation of public poli-

cies, and efficiency standards are a cornerstone of good national energy efficiency policy.

Fortunately, the history of our national efficiency standards is one of bipartisan support. I'm not sure committee members are aware, but the first corporate average fuel economy standards were signed into law by President Ford, and the first appliance and equipment standards were signed into law by President Reagan. These laws were created and moved through the Congress with broad bipartisan support. Over the decades, this tradition of bipartisan support has remained solid, with the Congress enacting significant legislation in 1990, '92, 2005, and 2007. All included efficiency standards.

The bipartisan work—this bipartisan work on standards is paying big dividends for our economy. For example, by 2020, appliance and equipment standards alone, not including CAFE standards, will be contributing 387,000 annual jobs to our economy. And these are jobs that are spread all across all 50 States.

As the focus of this hearing is on midnight regulations, I believe it's important to note that in the case of efficiency standards at least, it's Congress—not the Administration—that dictates the timelines and deadlines for action. And these aren't tied in any way to a given President's term in office.

The typical time needed to complete a standards rulemaking is three years because it involves a significant engagement with impacted manufacturers, stakeholders, and others throughout the process. It is true that the pace of standards rulemaking has been brisk during the Obama Administration. This was driven in large part by a need to meet Congressional directives and court-ordered mandates to catch up on backlogged standards. We see no evidence that the Administration can or will rush any efficiency standards at the end of this President's term.

While we have achieved great success through our—through appliance and equipment efficiency standards, we do believe there's always room for improvement. The Alliance, along with many stakeholders and others, would like DOE to make more transparent the models and data that it's using to perform its energy savings and performance calculations. And doing so would help to avoid delays in litigation.

There's also a big something I'm here to ask you to do, and that is to refrain from placing ad hoc policy riders on legislation that prevents DOE from enforcing standards that have been codified. Mr. Bosworth already mentioned that this allows what I would call unscrupulous manufacturers—he calls them bottom-feeders—to flout the law. So we'd like to see that.

So in conclusion, there is a huge portfolio of research and analysis that demonstrates that efficiency standards are driving innovation, saving American businesses and consumers money on their energy bills, and they're creating jobs. All of this leads to a more energy-productive and more globally competitive economy. Congress should be proud of the work it has done in this area and should continue this legacy of bipartisan legislation to set minimum efficiency standards for our appliances, our equipment, and our vehicles. Thank you.

[The prepared statement of Ms. Callahan follows:]

Statement

Ms. Kateri Callahan
President, Alliance to Save Energy

U.S. House of Representatives
Committee on Science, Space, and Technology

Wednesday, February 10, 2016

Thank you Mr. Chairman, Ranking Member Johnson, and members of the Science, Space, and Technology Committee for the opportunity to testify before you today about the history, importance, and current status of energy efficiency standards for equipment and vehicles. My name is Kateri Callahan and I serve as the President of the Alliance to Save Energy, a non-profit coalition of over 120 businesses, organizations, and institutions that is committed to advancing policies that will lead to greater energy productivity in our country and internationally.[1]

Alliance to Save Energy: Leadership and Mission

In 1977, U.S. Sens. Charles Percy (R-Ill.) and Hubert Humphrey (D-Minn.) founded the Alliance to Save Energy. I am honored to be a part of their legacy, which to this day emphasizes bipartisanship and finding workable solutions that will help our country meet our diverse energy challenges. We are proud to count U.S. Rep. Paul Tonko (D-N.Y.), a member of this Committee, as one of 14 honorary Congressional members of our Board of Directors. Our leadership also includes U.S. Reps. Michael Burgess (R-Texas), Steve Israel (D-N.Y.), Adam Kinzinger (R-Ill.), David McKinley (R-W.V.), and Peter Welch (D-Vt.). In addition to Members of Congress, our Board of Directors includes leaders from the diverse sectors of our energy economy, including manufacturing, utility, fuels, finance, and public interest.[2]

For nearly 40 years, the Alliance has engaged in advocacy, outreach, education, and program-management with the goal of developing and implementing policies that improve energy resource utilization in every sector or our economy as doing so reduces energy waste, thereby saving American businesses and consumers money while simultaneously improving the environment and enhancing energy security and reliability. We do not advocate for or against any fuel type. Rather, our goal is reflected in our motto—"Doing More. Using Less."—which applies across all energy resources, from coal to renewables.

In addition to our work at the U.S. national level, we also have worked in states and foreign countries and have successfully launched affiliated organizations within the U.S., Europe, Australia, and India.

[1] The complete roster of the Alliance's Associate members is provided as an attachment to this testimony.
[2] The complete roster of the Alliance's Board of Directors is provided as an attachment to this testimony.

Energy Efficiency as a Driver of Productivity and Economic Growth

Since the founding of the Alliance in the wake of the oil crises of the 1970s, the U.S. has made huge strides in driving energy efficiency throughout our economy with the aid of new technologies, significant public- and private-sector investment, and sound policies. In fact, since then, our country has doubled its energy productivity—here, defined as the gross domestic product (GDP) derived from each unit of energy consumed. The cumulative efficiency improvements since 1980 helped Americans save an estimated $800 billion in 2014.[3]

These savings are directly attributable to policies such as appliance and equipment standards, fuel economy standards, and building energy codes that have been enacted by Congress over the years and implemented by the U.S. Department of Energy (DOE) and other agencies. The Alliance has set an ambitious goal of once again doubling American energy productivity, this time by 2030. The challenges to attaining this goal in such a relatively short time are formidable, but the promised benefits from doing so are transformative and more than worth the effort. Meeting this goal will mean more economic output, more jobs, and more money in the pockets of homeowners and businesses.

An independent economic analysis of attaining the goal of doubling U.S. energy productivity found that doing so would "recycle" $327 billion in energy cost savings back into the economy—we would create 1.3 million new jobs, reduce imported energy to represent only 7% of total consumption, and reduce CO2 emissions to one-third below the level emitted in 2005.[4] The Alliance is committed to working to turn a range of strategies into actionable policies that accelerate the increase in energy productivity. We look forward to engaging with leaders in Congress to speed the deployment of these policies.

Why Standards Make Sense for America

Appliance and equipment efficiency standards have a decades-long track record of strong bipartisan support, and for good reasons. First, the monetary benefits from appliance and equipment standards are several: greater value from more functional devices, less waste, and lower utility bills for consumers. In fact, the efficiency standards put in place over the past 30 years, according to U.S. DOE "...are estimated to be over $950 billion through 2020, growing to over $1.7 trillion through 2030."[5] Second, the process that leads to standards is informed at every step by stakeholders representing diverse sectors so that negotiations reflect the respective interests of industry *and* consumers and will have positive effects on the environment.

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[3] Testimony of Steven M. Nadel, Executive Director of the American Council for an Energy-Efficient Economy, U.S. Senate Energy and Natural Resources Committee, 114th Congress, First Session, "Hearing on Energy Efficiency Legislation," April 30, 2015, http://www.energy.senate.gov/public/index.cfm/files/serve?File_id=2e117f0a-3593-4d25-b25a-9ada97a5a0e5, last accessed February 7, 2016.

[4] "American Energy Productivity: The Economic, Environmental and Security Benefits of Unlocking Energy Efficiency," Rhodium Group, February 2013, http://www.energy2030.org/wp-content/uploads/rhg_americanenergyproductivity_0.pdf, last accessed February 7, 2016.

[5] "History and Impacts," U.S. Department of Energy Office of Energy Efficiency and Renewable Technology, http://energy.gov/eere/buildings/history-and-impacts, last accessed February 8, 2016.

Industry traditionally has been a major driver of standards. Manufacturers benefit from regulatory certainty and the rewards of bringing better appliances and equipment to market. And more competitive companies lead directly to the creation of American jobs. Efficiencies in one sector, no matter the magnitude, lead to a more efficient overall economy that better positions America to compete in the 21st Century.

For these important reasons, it is no surprise to the Alliance that the first equipment efficiency standards were signed into law by President Reagan and that the Congress has regularly updated and expanded this program with strong support from Members on both sides of the aisle.

Positive Effects of Timely Regulations on Innovation and Competiveness

The benefits of appliance and equipment standards go beyond energy and cost savings. Standards are an important policy tool for driving innovation in product development and commercialization as well as overall economic productivity. More efficient appliances and equipment do more while using less, and often at the same or a lower price. Some may suggest that standards lead to price increases over the long-term. But an independent analysis has shown, to use a common household example, that the real price of refrigerators decreased by about 35% between 1987 and 2010.[6] Similar results were found for clothes washers (real price decrease of about 45%) and dishwashers (real price decrease of about 30%).[7]

Trends of lower prices and effects on consumers have been studied many times and research routinely appears in journals or at conferences.[8] One study from 2009 finds "...that historic increases in efficiency over time, including those resulting from minimum efficiency standards, incur smaller price increases than were expected by [U.S. DOE] forecasts."[9] The researchers reach four conclusions: retail prices steadily fall while efficiency increases, prices are often overestimated at the outset, the incremental price to increase appliance efficiency is declining, and price mark-ups and economies of scale may have played a role. What these researches did *not* find was evidence that consumers lose when new or updated standards are published.

As prices have decreased, performance has increased. Refrigerators, now available in many more configurations, operate more quietly and maintain more constant temperatures than in the past. Clothes washers have larger capacities, use less detergent, and offer a wider range of cycles. And dishwashers offer a wider set of standard features while also offering water

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[6] "Better Appliances: An Analysis of Performance, Features, and Price as Efficiency Has Improved," American Council for an Energy-Efficient Economy and Appliance Standards Awareness Project, May 20, 2013, http://aceee.org/research-report/a132, last accessed February 4, 2016. Summary also available at same Web address and http://www.appliance-standards.org/sites/default/files/Better_Appliances_Fact_Sheet_0.pdf, last accessed February 4, 2016.

[7] Ibid.

[8] "Publications," Lawrence Berkeley National Laboratory Energy Efficiency Studies Group, https://ees.lbl.gov/publications, last accessed February 5, 2016.

[9] "Retrospective Evaluation of Appliance Price Trends," Energy Policy, Volume 37, Issue 2, February 2009. Abstract and article available at http://www.sciencedirect.com/science/article/pii/S0301421508005193. Last accessed February 5, 2016.

savings.[10] Indeed, as the saying goes, "They don't make 'em like they used to." Rather, manufacturers produce more efficient appliances and equipment that offer more features—even at lower price points—saving money on energy bills for consumers and improving quality of life.

When we speak with Alliance Associates, regardless of sector, three words are mentioned with great frequency: "innovation," "productivity," and "competitiveness." These are attributes we should want to see in our modern economy. And standards drive all three. Energy efficiency does not result in making sacrifices or compromising on quality. Rather, as our motto states, it means doing more while consuming fewer resources. One Associate in particular always notes that improving efficiency in one area (such as in residential and commercial buildings) leads to better efficiency in all areas because of the systems effect. A more efficient appliance is a small but important contribution to a more efficient and productive economy. Innovation leads to efficiency and better devices and technologies. Standards reward innovation by assuring market leaders that early investments in more efficient product designs for appliances and equipment will be recovered in sales and market share.

Along with robust energy savings, appliance and equipment standards lead companies to invest in workers and create jobs. *In 2011, a report highlighted the fact that efficiency standards resulted in net job creation in all 50 states.* Many of our Associates have operations in the districts represented by members of this Committee and can attest to the quality and productivity of American workers. By 2020, appliance and equipment standards will be contributing 387,000 annual jobs to our economy.[11] Of course, these workers are also consumers, who will also have increased buying power for new appliances and equipment. That goes beyond the analysis cited here, but it still shows how efficiency in one area leads to greater efficiency across the economy.

Appliance, Equipment and Vehicle Standards: A History of Bipartisanship and Progress

Every president since Ronald Reagan deserves credit for the wide range of energy- and cost-saving appliance standards in place or under development today. Before being elected president, California Governor Reagan signed into law the legislation that led to the first state standards. Over time, the number and diversity of appliances and equipment subject to standards has grown. While standards have not usually been a partisan issue, it is worth noting that the most significant standards legislation has been signed into law by Republican presidents.

Legislation that aimed to improve the efficiency of household appliances was first enacted by Congress during the administration of President Gerald Ford. Later, the National Appliance Energy Conservation Act of 1987 was the first federal law that established standards. This legislation was approved 89-6—an overwhelmingly bipartisan margin—by the U.S. Senate and then passed by voice vote in the U.S. House of Representatives before it was signed into law by President Reagan.

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[10] "Better Appliances," last accessed February 4, 2016.

[11] "Appliance and Equipment Efficiency Standards: A Moneymaker and Job Creator," American Council for an Energy-Efficient Economy and Appliance Standards Awareness Project, January 26, 2011, http://aceee.org/research-report/a111, last accessed on February 4, 2016.

President George H.W. Bush signed the Energy Policy Act of 1992 into law after overwhelming votes in the U.S. House of Representatives (381-37) and U.S. Senate (93-3); he also signed into law the Clean Air Act Amendments of 1990, which passed both chambers of Congress without objection, and which put in place new emission standards for vehicles.

Later, Congress sent two bills—the Energy Policy Act of 2005 and the Energy Independence and Security Act (EISA) of 2007—that enjoyed broad bipartisan support to President George W. Bush during his second term. Each of these landmark acts of Congress is rightly considered a legacy-defining achievement. And each has led to gains in energy efficiency from expanded and updated appliance, equipment and vehicle efficiency standards.

Today, according to U.S. DOE, appliance and equipment standards apply to "...more than 60 products, representing about 90% of home energy use, 60% of commercial building energy use, and approximately 30% of industrial energy use."[12] These standards represent the bipartisan policy efforts of nearly 30 years. Today, compared with 1987, our daily lives at home and at work are considerably more dependent on devices and other machines that require electricity to operate. Congress has recognized this trend in modernization and acted accordingly. As technology innovation brings new consumer products to market, it stands to reason that these devices, like ones that came before, warrant efficiency standards to make sure that consumers don't waste energy and money on relatively new products like flat-screen televisions, cell phone chargers, and other power supplies.

The Role of Congress and the U.S. Department of Energy in Setting Efficiency Standards

The authority from Congress to issue standards dates back, in many cases, to 1987 or 1992. The process leading to a certain standard often begins in one administration, continues through another, and ends with an effective date even later. For example, Congress established a standard for dehumidifiers in 2005, which was later updated in 2007. The 2007 standard took effect in 2012. Another update is due in 2016 and will affect units beginning in 2019. Similar timeframes apply to standards for other common residential appliances and equipment such as ceiling fans, furnaces, ranges and ovens, and water heaters. Congress—not U.S. DOE—mandates the timelines and deadlines, which are not tied or aligned to a given president's time in office.

Standards take many years to develop and fully implement because of the intensive and extensive stakeholder-involvement process managed by U.S. DOE. Another determining factor in the timeline of a given standard is the required testing protocol. Information on the status of standards is shared in meetings, presentations, and in the Federal Register. Several organizations such as the Alliance issue public statements and reports on a near-constant basis to track progress and count savings.

[12] "Saving Energy and Money with Appliance and Equipment Standards in the United States," U.S. Department of Energy Office of Energy Efficiency and Renewable Energy, July 2015, http://energy.gov/sites/prod/files/2016/01/f28/Appliance%20Standards%20Fact%20Sheet%201%2026%202016.pdf, last accessed February 6, 2016.

The U.S. Department of Energy (U.S.DOE) is mandated by Congress to establish and update appliance and equipment standards regularly. In 2006, U.S. DOE stated that "...[a]ppliance and equipment standards are clearly one of the Federal Government's most effective energy- saving programs...and is having a major positive impact."[13] But, the program had by then grown unwieldy and priority was given to standards with greater estimated impacts, which contributed to delays in the rulemaking process for other products.

In response to litigation (and a consent decree) along with new mandates from Congress, in 2008, U.S. DOE developed and reported on a plan that required new or updated standards to be put in place by June 2011. U.S. DOE worked diligently in the intervening years and the number of standards being developed at once remained a key challenge.[14] U.S. DOE met its June 2011 deadlines as required by the consent decree.

U.S. DOE's legacy with respect to appliance and equipment standards during the Obama Administration will be one of tremendous savings and positive environmental effects. Since 2009, U.S. DOE has issued "...40 new or updated appliance standards across more than 45 products...."[15] Just these standards will generate savings worth $447 billion.[16] Add to this the enormous environmental and societal benefits of not consuming nearly 4.5 trillion kilowatt-hours and the case for appliance and equipment standards, in our opinion, is clear. But again, and as stated above, U.S. DOE under the Obama Administration simply is doing the job it has been assigned by Congress within the time frames that Congress has established.

Industry and Stakeholder Engagement

When the first standards were established, manufactures contended with widely varying state requirements which complicated business. With the advent of federal standards, U.S. DOE, energy companies, and interest groups now are able to work toward a single, nation-wide regulation that balances interests, recognizes economic constraints, and mitigates uncertainty. The process leading to a standard is understood by interested parties and conducted as public policy with the average consumer's interests in mind.

One particular standard that has gotten an extreme amount of attention and remains controversial—notwithstanding how wildly successful it has been in the marketplace—required the phase-out of inefficient light bulbs. The call for a national light bulb standard was made by industry, working with the Alliance and other stakeholders in a "Lighting Efficiency Coalition." The standard was developed through negotiations among industry, the efficiency community, and Members of Congress, and eventually was codified in the Energy Independence and Security

[13] "Energy Conservation Standards Activities," U.S. Department of Energy, January 2006, http://energy.gov/sites/prod/files/2013/12/f5/congressional_report_013106.pdf, last accessed February 4, 2016.
[14] "Implementation Report: Energy Conservation Standards Activities," U.S. Department of Energy, August 2008, http://energy.gov/sites/prod/files/2013/12/f5/congressional_report_0808.pdf, last accessed February 4, 2016.
[15] Ibid.
[16] "Q&A: Appliance Standards Questions and Answers," Appliance Standards Assistance Project, January 2016, http://www.appliance-standards.org/sites/default/files/Progress_toward_3_billion_CO2_reduction_Jan%202016.pdf, last accessed February 4, 2016. Savings equal to net present value of savings through 2045 discounted to 2014 (2012$).

Act (EISA) of 2007. During a hearing before the U.S. Senate Energy and Natural Resources Committee, U.S. Rep. Fred Upton (R-Mich.) described how the light bulb standard came to be:

> ...[The proposal to phase out 100-watt incandescent light bulbs] came from the industry, and because they're worried, I think, that some different, maybe fly-by-night group, that will come in, ultimately, and have a cheaper light bulb...on the shelf at the store. But in fact, the cost to the consumer will be...15 or 20 times more by buying that obsolete incandescent bulb versus the new standard that we're going to see. So they were the ones that came up with that idea and we wrote that right into the amendment, as it passed in the [U.S. House] Energy [and Commerce] Committee. I think this legislation that we've done is balanced, the preemption work was a great credit, kudos to [U.S. Rep. Jane Harmon (D-Calif.)]..., making sure it was properly constructed, all sides, in essence coming to the agreement.... The bottom line is this, by improving the standard, which is what we're doing, we will save American consumers 65 billion kilowatts of energy, just because of the light bulb changes, when this comes into [effect] beginning in 2012, 2013. Sixty-five billion kilowatts is the equivalent of 80 coal-fired electricity plants. That's pretty significant. This is more than just one light bulb at a time, it is in fact, a shining amendment in terms of what we can do together, House and Senate, Republicans and Democrats, environmentalists and industry, to make sure what we're getting the biggest bang for our buck.[17]

I quoted Rep. Upton at length because I could not convey his sentiments of bipartisanship and industry-stakeholder engagement any better. As the present chairman of the U.S. House of Representatives Energy and Commerce Committee, he should also be recognized as an authority on the subject of standards. The Alliance was proud to be a part of the efforts he and Rep. Harmon led to a successful conclusion.

Another example of a successful standard-development process happens to be very recent and very significant. In December 2015, U.S. DOE issued standards for commercial rooftop air conditioners, furnaces, and heat pumps, which will result in more savings than any other standard to date. This process, which began with legislation passed in 1992, involved—and was praised in press reports by—manufacturers, trade groups, energy efficiency advocates, and environmental and sustainability organizations.

To develop the standards announced in December, U.S. DOE convened 17 stakeholders including the Air-Conditioning, Heating, and Refrigeration Institute (AHRI), which represents manufacturers of air conditioning, heating, commercial refrigeration, and water heating equipment. In a joint press release touting the standard, issued with other key stakeholders, the President and Chief Executive Officer of AHRI wrote: "The consensus agreement provides our members with certainty while providing benefits for consumers and businesses."[18] These standards are proof that, even when dealing with the biggest impacts, regulations in this context can work and result in benefits to all stakeholders.

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[17] Transcript of U.S. Senate Committee on Energy and Natural Resources, 110th Congress, First Session, "To Receive Testimony on the Status of Energy Efficient Lighting Technologies and on S. 2017, the Energy Efficient Lighting for a Brighter Tomorrow Act," September 12, 2007, https://www.gpo.gov/fdsys/pkg/CHRG-110shrg39385/pdf/CHRG-110shrg39385.pdf, last accessed February 6, 2016.

[18] "Manufacturers, Efficiency Groups Praise Largest Energy-Saving Standards Ever Issued," Appliance Standards Awareness Project, Air-Conditioning, Heating, and Refrigeration Institute, American Council for an Energy-Efficient Economy, and Natural Resources Defense Council, December 18, 2015, http://www.ahrinet.org/site/A__1129/295/Modules/AHRI/Articles, last accessed February 5, 2016.

Constructive Suggestions for Improving Process

While the current standard development process is leading to positive outcomes, there remain ways to make improvements. For instance, many stakeholders would like U.S. DOE to find ways to increase transparency with respect to the data and models it uses to make performance and energy-savings calculations. More transparency could help stakeholders make more informed contributions to the standards process and, perhaps more importantly, help prevent situations that lead to litigation and delays. Simply put, good process pays dividends beyond energy savings.

Congress disrupts the established standards process each time it adopts *ad hoc* policy riders to appropriations bills. These riders, which are generally worded to prevent U.S. DOE from expending funds to implement standards for specific appliances and equipment, contradict directives from past statutes. Worse, from the perspective of manufacturers, riders introduce uncertainty and risk into a process that is designed to consider their needs. Riders only lead to longer delays that are costly to consumers.

To take the most famous case of inefficient light bulbs, which were phased out in EISA, Congress has repeatedly enacted a rider to prevent action by U.S. DOE to enforce the very standard that Congress itself enacted! Paying little heed to Congress's contradictory directive to U.S. DOE, most manufacturers simply went about their business and provided efficient, aesthetically attractive, and affordable light bulbs. If anyone benefited financially from later restrictions on U.S. DOE enforcement of the standard, it was unscrupulous importers and resellers who could flout the requirements with impunity. Today, thanks to the original impetus of EISA, consumers have better lighting choices than ever before, including high-efficiency halogen-incandescent bulbs, compact fluorescent bulbs (CFLs), and the latest innovation: solid-state light-emitting diode (LED) bulbs. LED bulbs are now selling at rapidly shrinking prices and steadily increasing their market share. We respectfully urge Congress to review the light bulb case study and to resist attempts to add regressive or restrictive standards language to future appropriations bills.

Vehicle Emissions Standards

In addition to appliance and equipment standards, the U.S. Department of Transportation's Corporate Average Fuel Economy (CAFE) standards program is the other main federal policy driver of energy savings. Combined, in 2014 these two policies accounted for savings (12.6 quads) that were equivalent to more than 10% of our country's annual energy consumption (across all sectors).[19] Much like the history of appliance and equipment standards, CAFE has largely enjoyed bipartisan support and has evolved across the administrations of presidents of both parties.

[19] "Which Energy Efficiency Policies Saved the Most Last Year?" American Council for an Energy-Efficient Economy, July 28, 2015, http://aceee.org/blog/2015/07/which-energy-efficiency-policies, last accessed on February 4, 2016. "Energy Efficiency in the United States: 35 Years and Counting," American Council for an Energy-Efficient Economy, June 30, 2015, http://aceee.org/energy-efficiency-united-states-35-years-and, last accessed on February 4, 2016.

CAFE standards date back to the Energy Policy and Conservation Act of 1975, which laid the groundwork for energy policy at a time when oil shocks caused our country to think more carefully about resources. The first CAFE standard was 18 miles-per-gallon in 1978; by 2025 it is scheduled to be 54.5. Consumers who purchase a new vehicle in model year 2025 will save over $8,000 in fuel costs during its useful life.

CAFE standards are required to represent the maximum feasible levels of fuel economy for each vehicle fleet in a given year. To achieve this, the involvement of and input from manufacturers and stakeholders is critical. The last major standards were announced in 2011 and enjoyed the support of 13 manufacturers, which combined to produce nine of every 10 vehicles sold, including the Big 3: General Motors, Ford, and Chrysler.

One key reason for the success of CAFE standards is the flexibility built into the structure of the regulations. Because industry worked with policy makers to establish the regulations, the standards are designed to help manufacturers manage consumer demand, mitigate uncertainty and risk, and make optimal business decisions. For example, EISA included provisions for an emission credit trading mechanism to promote early action on the part of manufacturers. These credits can be banked for up to five years, applied to future obligations, and sold to other manufactures in non-compliance.[20]

Additionally, EPA has implemented several measures aimed at reducing the compliance cost for smaller and intermediate-volume manufacturers. These measures include additional lead-time flexibility and a process to petition for alternative carbon dioxide standards. CAFE regulations also provide credit for non-engine-related improvements like more efficient air conditioning and off-cycle efficiencies such as start-stop controls and active aerodynamics. EPA also offers specific incentives for electric, plug-in hybrid, fuel cell, flexible fuel, and compressed natural gas vehicles.[21]

For over 40 years, dating back to the 94th Congress and President Ford, CAFE standards have dramatically reduced petroleum demand and consumption. This program has led to a better environment and increased energy security. Along the way, manufactures have been encouraged to innovate because of the flexibility allowed by regulations. As CAFE standards have risen, vehicles have become safer, quieter, and more reliable. And consumers and businesses have saved hundreds of billions on fuel costs while still moving themselves and their goods at will across the country.

Conclusion

As stated at the outset, I very much appreciate the opportunity to testify before this august Committee. I urge the members of the Committee to continue the long-standing, bipartisan tradition of support for appliance, equipment, and vehicle efficiency standards that have served our country and our economy so well over the past three-plus decades.

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[20] "EPA and NHTSA Propose to Extend the National Program to Reduce Greenhouse Gases and Improve Fuel Economy for Cars and Trucks," U.S. Environmental Protection Agency Office of Transportation and Air Quality, November 2011, http://www3.epa.gov/otaq/climate/documents/420f11038.pdf, last accessed February 6, 2016.
[21] Ibid.

Thanks to the leadership and visionary work of Congress, American businesses and consumers are wasting less energy and saving money on utility bills and at the pump; and our economy is producing twice as much GDP from each unit of energy consumed then it did in the 1980s. We need to continue this forward progress and double our energy productivity yet again if we are to continue to be the global economic leader. The technologies to do so are available today; what we need is a strong public policy infrastructure. Energy efficiency is an economic driver and the best means of delivering it into the economy is through federal appliance, equipment and vehicle standards.

Kateri Callahan

Kateri Callahan has been the President of the Alliance to Save Energy, a Washington, D.C.-based NGO since January 2004. Callahan leads a staff of 30 and oversees a budget of $7 million annually that supports energy efficiency policy research and advocacy, education and outreach and communications initiatives in the U.S. and around the world. Callahan is a member of the Alliance Board of Directors which is comprised of Members of Congress – serving in an honorary capacity – and leaders from all sectors of the economy. The Alliance also enjoys the support and participation of more than 120 businesses and organizations in its quest to advance energy efficiency as a means of improving the economy and our global environment as well as enhancing energy security.

During Callahan's tenure, major U.S. energy efficiency legislation has been enacted into law and significant federal funding has been provided to RD&D programs that advance energy efficiency across the economy. The Alliance to Save Energy has articulated a goal of doubling U.S. energy productivity by 2030 to spur the next generation of energy efficiency policy. The goal has been adopted by President Obama and his administration is implementing energy efficiency policies, strategies, partnerships and programs to achieve the goal. And, through a partnership with the Council on Competitiveness and the U.S. Department of Energy known as "Accelerate Energy Productivity 2030" implementation pathways toward attaining the goal have been created and the Alliance is working with state and local governments, businesses and other stakeholders to achieve this goal.

As chief spokesperson for the Alliance, Callahan appears regularly before the Congress and makes numerous appearances and speeches globally. She has spoken before the United Nations, the European Parliament, the International Energy Agency, the Organization of American States, and the Kyoto Club to name a few. She has been interviewed by top media including MSNBC, CNBC, PBS, CNN, FOX, NBC, and NPR.

Callahan also serves as a "C3E Ambassador" – a group of 20 distinguished senior professionals who share an interest in broadening the recruitment, retention and advancement of highly qualified women in the field of clean energy. She also currently serves as a Board member for the Keystone Energy Board and the Business Council for Sustainable Energy. In addition, she serves on advisory councils to the UC Davis Policy Institute on Energy, Environment and the Economy and the Duke University's Center for Energy, Development and the Global Environment (EDGE).

In recognition of her contributions to advancing energy efficiency, Callahan was an inaugural inductee into the Energy Efficiency Hall of Fame established by Johnson Controls and the United States Energy Association.

Prior to joining the Alliance, Callahan served as the president of the Electric Drive Transportation Association (EDTA) and as a non-lawyer professional at the law firm of Van Ness Feldman, where she filled various management and advocacy roles for a number of the firm's important coalition clients. Callahan began her D.C. career in the office of former U. S. Sen. Walter Huddleston.

Chairman SMITH. Thank you, Ms. Callahan.
And, Mr. Batkins.

**TESTIMONY OF MR. SAM BATKINS,
DIRECTOR OF REGULATOR POLICY,
AMERICAN ACTION FORUM**

Mr. BATKINS. Thank you, Chairman Smith, and Members of the Committee.
[Slide.]
Mr. BATKINS. I will direct your attention to the chart, which is now everywhere, which shows midnight regulatory activity from 1997 to 2012, and you'll notice two pronounced spikes. Those are in red, in 2000 and 2008. And what I mean by midnight regulations, when we studied the midnight quarter, which is just between November and January—and you'll notice that if you look at—all midnight rules where this chart shows are just significant rulemakings. It's roughly 80 to 90 percent more than other similar midnight quarters. For example, in 2000 and 2008 OIRA concluded review of 51 and 54 significant rulemakings.
During those next subsequent quarters, so February to April, the next closest economically significant reviews were 20 and 29. So we had almost double the amount of significant regulatory activity during the presidential midnight quarters as opposed to the next subsequent quarters. This chart is somewhat reflective of action at DOE and EPA as well, although perhaps a bit less so.
Now, Administrations, of course, have tried to curb this practice in the past, and this makes sense. Administrator Howard Shelanski has a memo sort of ushering in a new era of let's slow down the process. Let's not rush any particular regulations. Josh Bolten, who was the White House Chief of Staff in 2008, issued a memorandum which set up sort of a brief schedule of when proposed rules should come to OIRA and when final rules should head to OIRA. But as you can see in 2008, agencies still managed to finalize quite a number of midnight regulations, including from DOE and EPA.
Now, what does this mean? It has profound implications. We've heard the Mercatus data on quick OIRA review times generally lead to poor economic analysis, and poor economic analysis can often lead to poorer results as well. And when we're talking about multibillion, multimillion dollar rules, the Nation can't afford poor analysis. We want to be able to look back at these rules 5, ten years down the road and determine whether or not we were—they were effective. And rushing rulemakings through the process doesn't allow us to examine rulemakings, again, five, ten years later. So a measured pace that allows the small staff of OIRA to do their job is important.
Now, the Nation has already paid a pretty high price—I mentioned DOE and EPA—for those regulations. If you add up EPA and DOE on a net present value basis, it's roughly $500 billion in costs with an associated 33 million paperwork burden hours. Just to put that paperwork burden in context, it would take 16,500 employees working full-time, 2,000 hours a year, to complete the new paperwork from just these two agencies, which is one reason why the Nation's paperwork burden—and I checked today; it hasn't

changed that much—is still at the highest level we've seen in recent history.

So I've mentioned a lot of figures. What do they mean generally for individuals? Well, regulation imposes transition costs. Those costs can be borne by the firms in terms of their employees' pay or perhaps even employee dislocation, they can be borne by the shareholders of the companies, or they can be passed on to consumers in the form of higher prices, sometimes all three.

And agencies themselves do routinely admit—and there is evidence—that a lot of these costs do get passed on to consumers. For example, a hypothetical consumer purchasing a furnace fan, refrigerator, water heater, according to analysis, could pay an additional $600 on what is in essence a regulatory tax.

The G.W. Regulatory Studies Center and Sofie Miller have found that these burdens can often be regressive. They are based generally sort of on a one-sized-fits-all, but not all consumers have the same preferences. By using discount rates of 3 and seven percent, we sort of assume that all consumers behave the same way, and in many respects, that's not the case.

In terms of reform to the midnight regulation system, there are a lot of options, some of which are messy. We can do what Rahm Emanuel and Andy Card did when the Administration changed over and, in essence, issue a regulatory moratoria. I mean, for an entire month when President Obama took office, no new significant regulations came out of the White House.

We can also use the Congressional Review Act, which is, again, a messy sort of piecemeal approach. If there are regulations Congress doesn't like in 2017, they can use that approach to repeal them.

And there's also a positive approach. Congress could enact legislation providing for a flexible schedule for midnight regulation during presidential election years.

Another way, the ALERT Act, which Congress is currently considering, would prohibit a rule from taking effect unless posted on the internet for at least 6 months. That doesn't have the direct intended effect of curbing midnight regulation, but it is one approach.

And with that, I will conclude and I'll be happy to take your questions.

[The prepared statement of Mr. Batkins follows:]

"Midnight Regulations: Examining Executive Branch Overreach"

United States House of Representatives
Committee on Science Space and Technology

Sam Batkins, Director of Regulatory Policy*
American Action Forum

February 10, 2016

*The views expressed here are my own and not those of the American Action Forum.

Chairman Smith, Ranking Member Johnson, and Members of the Committee, thank you for the opportunity to appear today. In this testimony, I wish to highlight the following points:

- "Midnight" regulations or rules typically issued after Election Day, but before the next president takes office tend to cause a period of increased regulatory activity. Under both Democratic and Republican administrations, the midnight quarter between November and January is highly active for rulemakings, including controversial measures. OIRA Administrator Howard Shelanski has pledged to curb this practice, but Americans won't know the success of this effort for another year.
- Both the Department of Energy (DOE) and the Environmental Protection Agency (EPA) have a busy schedule of regulations remaining in 2016. The recent history of DOE and EPA rules has already resulted in tremendous economic costs with more than $500 billion in burdens.[1] This figure has real world consequences for consumers, employment, and the bottom line of countless companies.
- Reform options to curtail the practice of excessive midnight regulation could include the use of the Congressional Review Act (CRA), legislative approaches that ensure proper notice before final publication, and commitments from both the outgoing and incoming administrations to halt any expedited rulemakings.

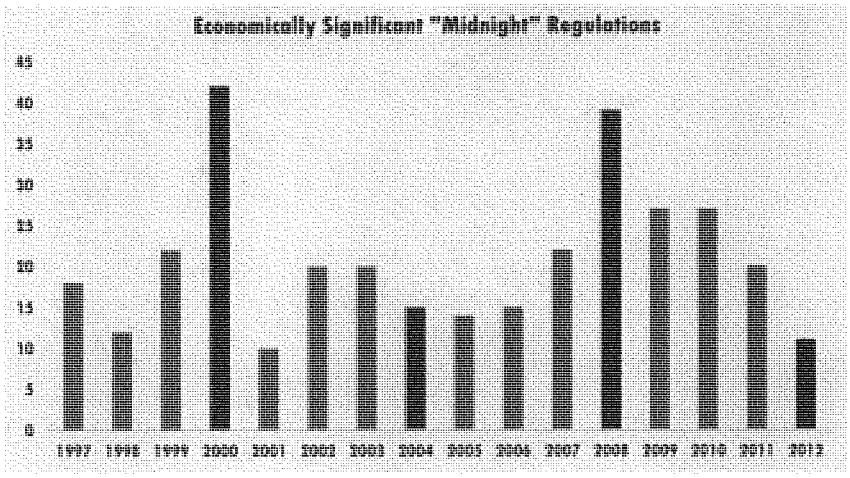
History of Midnight Regulation

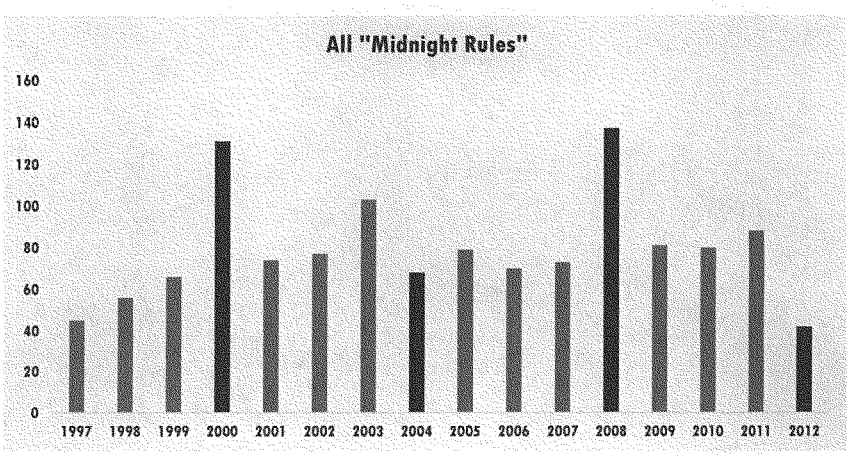
The term "midnight" regulation likely harkens back to the debate over President John Adams's midnight judges of 1801. After the election of Thomas Jefferson, President Adams signed the commissions of several judges, including three on his last day in office. Today, midnight regulation is generally known as any rule published after Election Day, but before the next president takes office. Scholars often study the midnight quarter, from November to January, during this presidential transition.

During any quarter from November to January, federal regulators will still issue new rules, but there is an incentive for the outgoing administration to cement as many regulatory priorities as possible before the next administration takes office. Given the reality that some midnight regulation will occur, the question is whether a particular midnight quarter experiences significantly more regulatory activity than other quarters with no presidential transition.

For 2000 and 2008, the last time political parties switched hands in the White House, there was a pronounced spike in regulatory activity during this midnight period, for both economically significant rules (those with an economic impact of $100 million or greater) and all rulemakings. The graphs below chart these spikes.

[1] American Action Forum, "Regulation Rodeo," available at http://bit.ly/1nRYmkh.





As seen above, both 2000 and 2008 saw significant surges in regulatory activity. For significant activity, regulators implemented more than 40 rules during the 2000 midnight period or more than double the average for non-midnight years. In 2008, regulators also finalized nearly 40 significant rules. For comparison, in 2007 during the midnight quarter, there were only 22 significant measures.

The graph examining all rules looks nearly identical to the significant rule graph. In 2000, cabinet-agency regulators issued more than 130 rules, which is 1.7 times greater than the non-

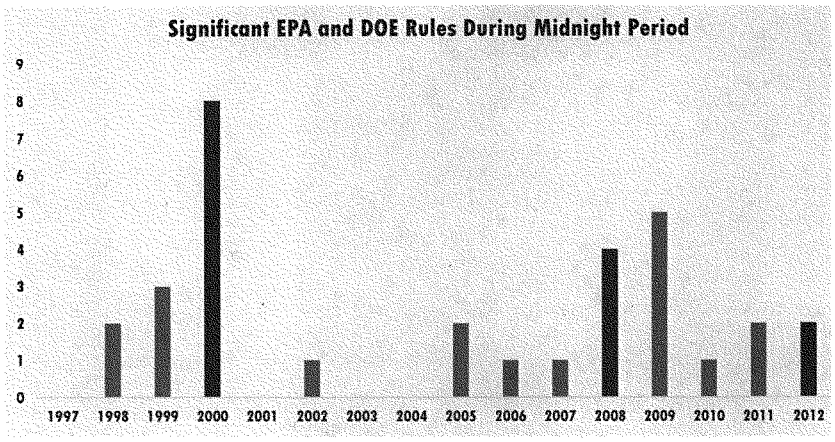
midnight average (74.3). The story was similar in 2008, when the administration approved 137 rues, nearly twice the non-midnight average.

It should be noted that 2004 and 2012 did not experience any noticeable increase in activity; in fact, 2012 expericnced some of the slowest midnight activity during the period studied. Why? A simple explanation is there was no need to rush rules through the process because at that time for both President Bush and President Obama, there was no midnight for their term in office. Both presidents knew they had four additional years in office.

There is some evidence, as reported by the *Washington Post*, that the Obama Administration intentionally delayed controversial rules until after Election Day.[2] One notable rule, Tier 3 standards for vehicle fuel, will slightly increase the price of gasoline. The White House signaled, at a time of high gas prices, that this rulemaking might be politically controversial. Thus, Tier 3 wasn't officially proposed until May 21, 2013.[3]

Neither EPA nor DOE have been immune to the surge in midnight rules. According to OIRA, EPA is the most active regulator, with regard to total costs and benefits, and DOE is not far behind, in third place among cabinet agencies.[4] Any regulatory wave will likely involve these two agencies and the evidence reveals they have played notable roles in past midnight regulation. In 2000, the administration issued eight economically significant EPA and DOE rules or more than five times the non-midnight average of 1.5 rules. In 2008, regulators finalized four significant rules from these agencies; while not as high as 2009, this figure is still more than twice the non-midnight average. The graph below highlights the midnight trends at EPA and DOE.

[2] *Washington Post*, "White House Delayed Enacting Rules Ahead of 2012 Election to Avoid Controversy," available at wapo.st/1X5PKm2.
[3] 78 Fed. Reg. 29,815, available at https://federalregister.gov/a/2013-08500.
[4] Office of Information and Regulatory Affairs, "2014 Report to Congress on the Benefits and Costs of Federal Regulations," available at 1.usa.gov/1IX8lxD.



There is a growing body of research that suggests expedited rulemakings lead to poor economic analysis. The Mercatus Center at George Mason University has found shorter review times lead to lower-quality regulatory analysis.[5] This poor analysis could result in unintended consequences for rules after implementation or the inability of scholars and regulators to judge the success or failure of a rule. The Administrative Procedure Act established a scheduled and deliberate timeline for federal regulation and the outcome of a presidential election should not alter the rulemaking process.

Finally, a more immediate concern for Congress and the administration might not be midnight regulation, but rules rushed before the carryover provision of the CRA becomes effective. According to AAF's calculations based on initial House and Senate calendars, any regulation issued in late May would likely be subject to a CRA resolution of disapproval in 2017.[6] There are many factors that affect the day when the carryover provision applies and the administration's possible motivations: number of days Congress is actually in session, the

[5] Mercatus Center, "Does OIRA Review Improve the Quality of Regulatory Impact Analysis?" available at bit.ly/1UNPqai.
[6] American Action Forum, "May 17, 2016: Regulation Day for Obama Administration," available at bit.ly/1PUyxpX.

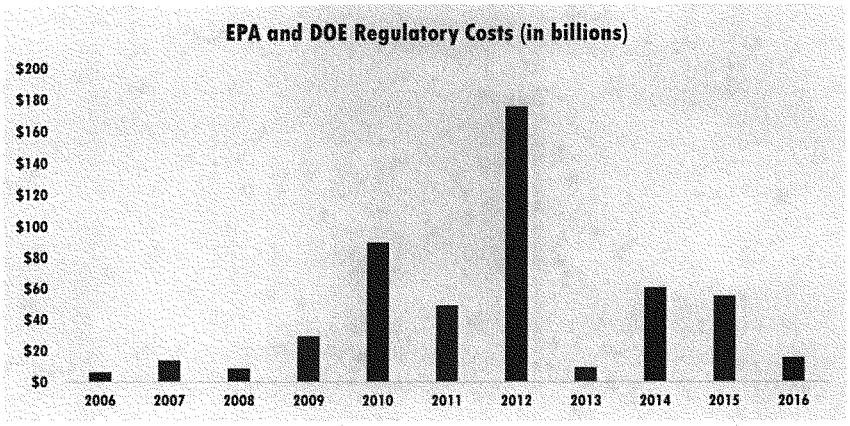
outcome of 2016 elections, and procedural hurdles that might halt any rush in regulation this spring. It is too early to tell whether the administration acknowledges the day when new rules are subject to the CRA and if current rules are on an expedited schedule. However, Congress and scholars should examine activity in the coming months to determine if there is a mini-rush in federal regulation to avoid a CRA vote.

Remaining DOE and EPA Rulemakings

Given the historical problem of midnight regulation and the outsized role of DOE and EPA in federal rulemakings, it's necessary to scrutinize their remaining regulatory agendas and their records to date.

Since 2006, DOE and EPA have imposed 298 rulemakings with a quantified cost, benefit, or paperwork burden. Since that time, the agencies have published $513 billion in regulatory costs, accompanied by more than 33 million paperwork burden hours.[7] To put these figures into perspective, it would take more than 16,500 employees (working 2,000 hours annually) to complete 33 million hours of paperwork. The $513 billion figure amounts to a regulatory burden of $1,594 per person from just these two agencies. EPA's paperwork burden has grown 26 percent since 2006 and now sits at a historic high.

As noted above, based on AAF data (available at www.regrodeo.com), not only has regulatory activity at DOE and EPA peaked during election years, but costs have as well:



As shown above, regulators tend to publish expensive regulations during election years, but this trend is less pronounced than during midnight periods. The median cost for election year rules from EPA and DOE rules is $38.1 billion, compared to $29.3 billion for all years. It's important to note 2016 is included in the above tally, even though there is only one month of data. Already,

[7] American Action Forum, "Regulation Rodeo," available at http://bit.ly/1nRYmkh.

the two agencies have added $15.7 billion in costs, more than 2013, 2008, and 2006. January could portend a busy year for EPA or DOE or possibly fade like 2013.

Regulatory activity does not appear to be waning at DOE. There are six economically significant rulemakings at OIRA for review currently (as of this writing):[8]

- Efficiency Standards for Portable Air Conditioners
- Efficiency Standards for General Service Lamps
- Efficiency Standards for Manufactured Housing
- Efficiency Standards for Packaged Boilers
- Efficiency Standards for Water Heating Equipment
- Efficiency Coverage Determination for Computers and Backup Batteries

If there is a slowdown in regulation, it likely won't be from DOE. There is little data available now on the possible costs and benefits of these pending proposals, but based on previous data, the average significant DOE rulemaking from the Obama Administration lists $487 million in annual costs and $1.6 billion in annual benefits; for net present value, the average costs are an astounding $9.8 billion. Thus, if the past averages are predictive, these six rulemaking could impose more than $2.9 billion in new annual costs.

For EPA, there is presently just one economically significant measure pending at OIRA, but the historical totals from the agency have had a tremendous impact on the U.S. economy. For example, on average the net present value costs for EPA final rules tops $10 billion, with an annualized burden of $1.6 billion; the average paperwork burden associated with these rulemakings eclipses 870,000 hours.

Beyond what is currently at OIRA, there is a slate of rulemakings that could be finalized later this year, into the midnight period. In June EPA plans to finalize a new round of emissions standards for fracking.[9] The proposed version of this rule projected costs near $420 million.[10] July is also slated to be a busy month for EPA and DOE. Another round of dishwasher efficiency standards is expected then, with possible costs of $7.1 billion.[11] There are plans to finalize a second round of efficiency standards for heavy-duty trucks and engines. The total cost of that rule could approach $31 billion, according to initial agency estimates.[12] It's notable that this rulemaking was initially scheduled to arrive at OIRA for review in January 2017 during the heart of the midnight period.[13] A revision to the rulemaking timeline sped the process up to July of this year.[14] If all of these measures are finalized in 2016, it could easily challenge previous records for regulatory burdens.

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[8] Office of Information and Regulatory Affairs, "Search of Regulatory Review," available at 1.usa.gov/1SvrZVL.
[9] Office of Information and Regulatory Affairs, "Oil and Natural Gas Sector: Emission Standards for New and Modified Sources," available at 1.usa.gov/1PWJZaQ.
[10] 80 Fed. Reg. 56,596, available at 1.usa.gov/1VQGZuZ.
[11] 79 Fed. Reg. 76,144, available at 1.usa.gov/23LdYGU.
[12] 80 Fed. Reg. 40,137, available at 1.usa.gov/1QIlPhi.
[13] Office of Information and Regulatory Affairs, "Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles--Phase 2," available at 1.usa.gov/1P96KF1.
[14] Id. at 1.usa.gov/20ttMPh.

What do all of these figures and rulemaking timelines mean for consumers and businesses? Typically, consumers bear the cost of regulation through higher prices, but that is not always a certainty. Someone must bear the burden when a regulation imposes transition costs: employees at a firm through layoffs or reduced wages, lower returns for the company, or costs passed on to the consumer in the form of higher prices.

For consumers, last year AAF detailed how DOE's regulations routinely forecasted both layoffs for company employees and higher prices.[15] For example, consumers are paying $2,300 in price increases from just ten recent rules. Few consumers will be affected by every rule, but a hypothetical individual buying a new refrigerator, furnace fan, and water heater could face a "regulatory tax" of $620. In most instances, the consumer would have no knowledge that federal regulations drove up the price of the item.

EPA regulations are also not immune from driving up prices for consumers. The agency's regulatory analysis for a recent renewable fuel measure admitted the regulation could increase food prices by "roughly $10 per person per year."[16] Today, this equates to more than $3.2 billion in higher food prices because of the mandate. EPA also conceded that: its Mercury Air Toxics rule would increase electricity prices by 3.1 percent, its Cross-State Air Pollution rule would boost prices by 1.7 percent,[17] and the Clean Power Plan could drive up electricity costs by 3.2 percent.[18] In isolation, these prices increase appear minor. However, they amount to a combined 8 percent hike in utility bills, a significant impact for many middle-to-low income Americans.

Agencies also acknowledge that these regulations have tremendous benefits for the environment and society. Yet, some assumptions underlying these benefit figures have been questioned by academics across the ideological spectrum. Sofie Miller of the GW Regulatory Studies Center has found DOE's reliance on low discount rates may not accurately represent average consumer preferences, especially for low-to-middle-income Americans.[19] For example, Miller notes that a new rule for furnace fans could cause prices to increase by $64 to $154 per unit. Some consumers will keep the fans long enough to realize significant energy savings and generate net benefits, despite the higher upfront purchase price. However, even DOE's own analysis estimates 30 percent of consumers will experience net costs. This one-size-fits-all approach to regulating efficiency often results in higher burdens for millions of Americans.

One of the biggest questions with DOE rulemakings is the agency's use of standard discount rates: three and seven percent. These lower discount rates, used by most agencies, tend to benefit higher-income households. As Miller notes, "[T]hey have more certain future streams of income; low-income households, on the other hand, do not benefit from the same certainty."[20] Using discount rates that better represent low-to-middle-income households can quickly change DOE

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[15] American Action Forum, "The Department of Energy: Under-the-Radar, Overly Burdensome," available at bit.ly/1hQOIL9.
[16] 77 Fed. Reg. 59,472, available at 1.usa.gov/1R69AwW.
[17] American Action Forum, "The Consumer Price of Regulation," available at bit.ly/ScMmtq.
[18] American Action Forum, "EPA's Greenhouse Gas Regulation Expects Coal Generation to Decline 48 Percent," available at bit.ly/1KPazj1.
[19] Policy Perspectives, "One Discount Rate Fits All? The Regressive Effects of DOE's Energy Efficiency Rule," available at http://www.policy-perspectives.org/article/view/15110.
[20] Id.

rulemakings with net benefits into rules with net costs to consumers. Some efficiency rules function as a regressive transfer of income from low-income individuals to high-income households.

Finally, although both DOE and EPA are active regulators, the former rarely receives the same level of media scrutiny. For example, EPA's "Clean Power Plan" received more than 4.3 million public comments.[21] By contrast, DOE's most expensive rule of 2015 for fluorescent lamps received just 25 comments.[22] This disparity is largely a function of EPA consuming most of the regulatory oxygen. This does not indicate DOE measures only include unsubstantial burdens or fail to adversely affect consumers. Indeed, since 2006, the agency has imposed more than $174 billion in regulatory costs or $540 in burdens per person.[23] As noted above, many of these costs impose regressive impacts for low-income households. DOE might not be in the news now, but it certainly has the regulatory agenda to warrant heightened coverage.

Possible Reforms

Addressing midnight regulation, as two administrations can attest, is not an easy task. In 2008, OIRA Administrator Susan Dudley noted the "pressures and incentives to complete regulations before the stroke of midnight."[24] To push agencies to adhere to a moderate pace, White House Chief of Staff Joshua Bolten urged agencies to propose rules no later than June 1, 2008 and finalize them no later than November 1, 2008.[25] Despite these warnings, the 2008 midnight period was still a record time for regulation, with nearly 40 economically significant measures. As the Government Accountability Office (GAO) reports, there was a major rule issued every other day in President Bush's last month in office.[26]

Today, Howard Shelanski has attempted to curb the practice of midnight regulation as well. In a memo to agencies, "Regulatory Review at the End of the Administration," he urged: "agencies should strive to complete their highest priority rulemakings by the summer of 2016 to avoid an end-of-year scramble that has the potential to lower the quality of regulations that OIRA receives for review and to tax the resources available for interagency review."[27] Despite this memo, and the past pleas of Joshua Bolten, there is little penalization for agencies rushing regulation.

Perhaps, Congress or the administration could explore more formal measures to address midnight regulation, as opposed to temporary and *ad hoc* memos. Congress could propose legislation that would establish enforceable guidelines for end-of-administration rulemakings, similar to the Bolten memo. This legislation wouldn't end regulation during the midnight period, but it could ensure an orderly process and allow OIRA an opportunity to thoroughly vet new

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[21] Regulations.gov, "Docket ID: EPA-HQ-OAR-2013-0602," available at 1.usa.gov/1v0YbOW.
[22] Regulations.gov, "Docket ID: EERE-2011-BT-STD-0006," available at 1.usa.gov/1VQJQEf.
[23] American Action Forum, "Regulation Rodeo," available at http://bit.ly/20F8ZF.
[24] Forbes, "Obama Officials Prepare for the Stroke of Midnight," available at onforb.es/20JFOAP.
[25] The White House, "Issuance of Agency Regulations at the End of the Administration," available at bit.ly/1nQey5W.
[26] Government Accountability Office, "Reports on Federal Agency Major Rules," available at 1.usa.gov/1SLZrFO.
[27] Office of Information and Regulatory Affairs, "Regulatory Review at the End of the Administration," available at 1.usa.gov/1TH9753.

rules. An incoming president could also choose to issue an executive order outlining steps for midnight rules, but enforceable legislation would be preferable to an executive order.

Congress already has pending legislation that could address some of the problems outlined. The ALERT Act (H.R. 1759) would prohibit a rule from taking effect unless it has been posted on the Internet for at least six months. This would address some of the issues with hurried regulation. For example, an efficiency rule for heat pumps during the 2000 midnight quarter was proposed in October of 2000 and finalized by January 2001, a period of just 107 days.[28] Some comment periods last longer than the entire rulemaking history of the heat pumps measure.

If reform fails, the next administration is left with a few drastic options, including a regulatory freeze. President Obama's Chief of Staff, Rahm Emanuel, implemented a temporary freeze in 2009 in response to midnight rules from the Bush Administration. In a memo, he requested all agencies to refrain from publishing new rules, pullback any rules that had been submitted to the Federal Register, and consider extending the effective date of rules already formally published.[29] This acted as a brief *de facto* moratorium on regulation. For example, the administration withdrew eleven significant regulations at OIRA in its first week and didn't approve its first significant rule for more than a month. Again, Congress could choose to formalize these temporary freezes into legislation, which would discourage the practice of rushing regulation.

Finally, if no pending reforms are signed into law, Congress can always address midnight rules through the CRA. The carryover provision allows legislators in 2017 to review rules issued 60 session or legislative days before the end of Congress. If there are any particularly egregious midnight regulations, the CRA allows Congress to address many of them at the start of the next session. However, the CRA has only been used successfully once and it is a blunt policy instrument. If a CRA resolution is signed into law and a rule is rescinded, it may not be reissued in "substantially the same form."[30] Although there will be dozens of rules eligible for CRA votes next year, it's unlikely that more than a handful will receive votes.

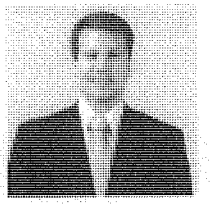
Conclusion

The nation won't know if midnight regulation is a pervasive problem yet again until 2017. If too many rulemakings are rushed, there could be legal, economic, and other unintended consequences for the nation. Congress can address the problem of midnight regulation legislatively, either through use of the CRA or a more direct legislative approach that targets expedited rulemakings.

Thank you for your time. I look forward to answering your questions.

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[28] Office of Information and Regulatory Affairs, "Standards for Central Air Conditioners and Heat Pumps," available at 1.usa.gov/1UOwQi7.
[29] The White House, "Memorandum for the Heads of Executive Departments and Agencies: Regulatory Review," available at wapo.st/1SvTuP4.
[30] 5 U.S.C. § 801(b)(2), available at bit.ly/1KsSBDK.



Sam Batkins *Director of Regulatory Policy*

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Biography Research Insights All Work

Sam Batkins is director of regulatory policy at the American Action Forum. Batkins focuses his research on examining the rulemaking efforts of administrative agencies and Congress. His work has appeared in The Wall Street Journal, The New York Times, The Hill, Reuters, and The Washington Post, among other publications. He has testified before the U.S. House, Senate, and state legislatures across the country.

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Prior to joining the Forum, Batkins worked at the U.S. Chamber of Commerce, Institute for Legal Reform and the National Taxpayers Union. At the U.S. Chamber, he focused on lawsuit abuse, tort reform, and federal regulation. During his time at the National Taxpayers Union, he conducted studies on state and federal spending.

Batkins received his B.A. in political science from Sewanee: The University of the

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Chairman SMITH. Okay. Thank you, Mr. Batkins.

Ms. Kerrigan, let me address a question to you but at the outset point out, as I mentioned in my opening statement, that in 2015 the President proposed 15 different energy regulations. In the three-year period prior to that, he proposed only five. So that means that last year, the rate of energy regulations was about nine times what it had been in the previous three years. No telling what it's going to be in 2016 if that trend continues. But what is the impact of all these regulations on two discrete groups: small business and the economy?

Turn on your mike. Yes.

Ms. KERRIGAN. Got it. I will also add that if you looked at—if you look at the unified agenda that was put out in November 2015, that the Administration will also issue 75 economically significant rules this coming year, and last year, they issued 62 such rules. So there will be an uptick on——

Chairman SMITH. Right.

Ms. KERRIGAN. —that side as well.

I mean, look at the—as I mentioned in my statement, I mean, we're still dealing, I think, with a very tough economy from the small business perspective. They're very concerned and continue to be about weak sales, sales growth, the direction of the economy in 2016. I think NFIB had—its small business index came out yesterday, which showed they're very concerned about sort of where the economy is headed in 2016 and what that means for sales growth.

So when—so there's a little wiggle room, you know, when it comes to costs, and regulations add costs on these small businesses. They're already dealing with a flood of—I mean, the ObamaCare regulations and regs over the last few years, and if we're—and we're also staring down the—staring at many more workplace regulations, overtime regulations, a whole host of things on top of environmental and energy regulations.

So this cumulative impact has a massive impact on their ability to invest, to grow, to hire new employees, to compete in the marketplace, and to survive, quite frankly.

Chairman SMITH. Okay. Thank you, Ms. Kerrigan.

Mr. Batkins, you have heard today and we've heard the Administration say that somehow all these regulations are good for the economy. What's the response to that assertion?

Mr. BATKINS. Well, I mean, if you take a deep dive and go into their own regulatory analysis, you'll find them admit often that regulations could raise healthcare costs, could raise energy costs, and could raise costs to the consumer. Another impact which is probably not talked about a lot is there are, I think, by our account, roughly 30 regulations where even regulatory agencies admitted that costs would exceed the benefits. And there have been a few in the environmental realm as well. So, you know, I think a lot of the big regulations get a lot of play in the press, but again, there are several where the agencies have admitted costs would exceed benefits.

Chairman SMITH. Okay. Mr. Batkins, last question. What can we do to make the regulatory process more transparent, more honest?

Mr. BATKINS. Well, it's a great question. One we've mentioned, Mercatus here, their research, looking at sort of the completeness

of regulatory analysis. And they use a scale of—out of 30, and I think DOE on that scale is a 19 out of 30, which is not a grade that I would want to get. But it does actually best other Cabinet agencies. EPA is about a 15 out of 30.

So one thing that a lot of—when I talk to people who actually have to comply with regulations that are looking at the regulatory impact analysis is they want a way that they can sort of completely reproduce what the agency's analysis says. And that might be the case sometimes, but oftentimes, that's not the case, and the ability to sort of really see what the agency—what their assumptions are and how those assumptions play out in the data represented to the public.

Chairman SMITH. Okay. Thank you, Mr. Batkins.

The gentleman from New York, Mr. Tonko, is recognized for his questions.

And let me say I'm going to need to excuse myself for a few minutes but will catch up on the gentleman's questions later on.

Mr. TONKO. Okay. Thank you, Chair. And thank you to all of our witnesses for joining us today.

Kateri, it indeed is great to see you, and thank you for the awesome work the Alliance does on this issue. I'm proud to serve as an honorary member, as you indicated, of the Alliance's board, and I strongly believe that energy efficiency should be our fuel of choice.

I have to tell you, I shared with Chair Smith—he had asked me about that assignment. I said I was on the board with the Alliance prior to my days in Congress also as President and CEO of NYSERDA, New York State's Energy Research and Development Authority. So I'm proud of that assignment. I'm especially proud that New York's capital region has recognized that it is indeed necessary to innovate and make the transition to a more energy efficient world.

So my question to you, Ms. Callahan, in your assessment of the industry, it is your experience that regulation often will spur the private sector to innovate. Do you agree that private industry in America has proven time and time again that it has the ability to adapt and grow when new rules or policies are introduced? And specifically, how have you seen industry innovate as a result of energy efficiency standards?

Ms. CALLAHAN. Thank you very much for that question, Congressman Tonko. I couldn't agree more strongly that regulations have led to innovation and technology, and I want to talk about that in a minute. But I also want to address, if I could for a second, Chairman Smith's questions as well.

We—our information that we have is that DOE issued 10 standards or updates to standards in 2014 and 10 in 2015. There are 16 on the regulatory agenda now, and if they follow suit, a couple of those, they'll defer from updating. A couple others may follow—flow over. So we don't see that there's going to be any big uptick in that.

And I think it's also really important to note that of all of the regulations that are at OIRA for review, all but one have been there for more than 90 days, so they're overdue. And only one is a final rule. So it's just going along in the regular process in the regular order of how we establish efficiency standards.

So let's talk about how they've created innovation and driven it. A great example is a refrigerator. A refrigerator today uses 75 percent less energy. It only uses a quarter of the energy of one that was built in the '70s, it's 20 percent bigger, and it consumes—and it costs about 25 percent less in real dollars.

So if—we're getting it all. We're getting better products, we're getting greater choice. The light bulbs which have caused some controversy in terms of the mandates that were put forward there, I would note that it was the manufacturers working with us, the stakeholders working with Members of Congress to put those in place. And what we've seen now, instead of one choice of an inefficient incandescent light bulb, we have many, CFLs, we have LEDs coming onto the market. The prices are falling dramatically. Now, you can choose color in the light you want, you can choose longevity of light bulbs. You have a wide selection, and all for costs that are coming down very significantly.

The list goes on and on. Clothes washers, dishwashers, they perform better. Clothes washers, as an example, they are—cost about 45 percent less than they did before standards were put in place. Dishwashers are down about 30 percent. So you see costs falling for the first price. You also get the savings on the backend. And let's remember that homeowners are spending the second-most amount of money in their budget on their energy bills. After the mortgage, next up is energy bills, which are about $2,000—between $2,000 and $2,500 a year.

So we're getting all kinds of innovation and products, we're getting savings in both ways, products that are coming to market and on the energy savings. So we see it really as a win-win-win, and a lot of that secret sauce is because the manufacturers are working with DOE in a transparent way to develop standards that they know they can meet.

Mr. TONKO. And also, Mr. Batkins' testimony argues that efficiency standards can have a negative impact on low-income consumers that may have to pay more initially for equipment that meets the standards, and then they may not keep those items long enough to reap the lifecycle cost benefits. How would you respond to those assertions? And is this a significant issue? And if so, what would you recommend to address it?

Ms. CALLAHAN. Well, I couldn't disagree with that more. First of all, a lot of low-income people actually rent homes and pay utility bills, but there's a split incentive. The people that own the buildings that supply them with the dishwashers, the clothes dryers, they don't have an incentive to put in the most efficient equipment because they're not going to be paying the bills. The person that lives there pays the bills. And so if you set minimum levels of efficiency allowable in the market, you make sure that the low-income people, like the people that can afford higher-end products, are getting an efficient model and they're saving on their energy bills.

I also—I'll go back to the light bulb. You know, people on fixed incomes or low incomes might make a choice to buy a 25 cent incandescent light bulb over a $2 CFL or a $3 LED. They're going to—that's going to cost them $60 over the cost of the product. So, you know, a lot of people just don't have the information at hand,

don't know the decisions they're making are going to cost a lot more.

So again, I think that, you know, as long as it's cost-effective, as long as these are improving and innovating products, the low-income folks are benefiting, as are the high-income folks.

Mr. TONKO. Thank you very much. And with that, Mr. Chair, I yield back.

Mr. WEBER. [Presiding] I thank the gentleman.

Before I recognize myself for five minutes, I would like to give Mr. Batkins a chance to respond to that previous statement.

Mr. BATKINS. Sure. In my testimony I sort of just merely highlighted the research which exists now, which basically just looks at consumer preferences by income range. Obviously, there are some consumers who will come out with a net benefit from efficiency standards. But what the existing research looked at was discount rates, and they found that lower-income consumers typically had much higher discount rates than higher-income consumers. And if you use those higher discount rates for a lot of these energy efficiency rules that were studied, they turn net costs as a result.

Mr. WEBER. Thank you, Mr. Batkins. And actually, Mr. Bosworth, would you like to weigh in on that as well?

Mr. BOSWORTH. Well, one thing I would say is she is correct about refrigerators. Refrigerators are a sealed system. They come in a box. You slide it into your house. It operates. The only problem I see with the modern refrigerator is the old refrigerators had a little defrost timer. It cost about 30 bucks to replace. These new refrigerators, they got a control board in them, a circuit board. They go out, it costs a couple hundred dollars to replace, plus the labor. So there is—with the energy efficiency, there is more cost on repair and maintenance.

As far as central air-conditioning and heating, the unit is only as good as the installation. And you can put in a 13, 14. You can put in a 92 AFUE furnace, but if it's installed improperly or if it's installed to undersized ductwork or a duct leaking in the attic or return air is leaking from the attic or from the basement or whatever, it's not going to get the efficiency. So the equipment is fine and dandy, but it's the installation that makes a difference.

Mr. WEBER. Well, it is. And of course you know I own an air-conditioning company, and you're not—you know, your—Bosworth was started in '59, and I'm guessing you probably didn't start that in '59——

Mr. BOSWORTH. No, I'm——

Mr. WEBER. —because you look a little younger than I do. But you've been in the air-conditioning company—business how long?

Mr. BOSWORTH. I went to work for my dad in 1985, and I took the business over in 2001 when he passed away, and so far we've—we're still paying the bills.

Mr. WEBER. Well, I started Weber's Air and Heat in 1981, November of '81, and, you know, you and I would agree there's a lot of stories of people who are hard-pressed to pay for these higher-efficiency units, and then when they do break, boy it is, there is a shock to them because they are so much more expensive to repair.

And, Ms. Kerrigan, I'm going to give you a chance to weigh in on what they cited as well.

Ms. KERRIGAN. I think I'll address this from the—you know, from the small business impact in terms of, you know, the energy—in terms of, you know, some of these standards and regulations that, you know, there are winners and losers, I think, in the small business community. I mean, certainly, there are those businesses who gain, you know, from these types of regulations and mandates. And—but there's a host of other businesses, you know, the manufacturers and others, that—I mean, these are—they're real costs, you know, involved to the—into their businesses in terms of the changes that they have to make, in terms of their opportunity for growth, in terms of where their capital goes, their competitiveness, et cetera. So, I mean, there's a cost to businesses, to small businesses, and to the people that work for those businesses as well.

Mr. WEBER. Well, thank you. I just wanted—since your study was cited, Mr. Batkins, I wanted to make sure that the others had a chance to weigh in on that as well.

I'm now going to recognize myself for five minutes with questions.

Mr. Batkins, continuing with you, the Chairman mentioned in his opening statement that your analysis that you conducted on the cost of the regulations promulgated under President Obama, which, for last year alone, cost $197 billion or about $600 for every American citizen. Now, I'm assuming that means men, women, and children, quite frankly, and I'm just thinking children don't pay utility bills. Is it just me? It doesn't take an economist to understand that this regulatory burden will hit the poorest Americans the hardest.

So I want you, if you can, I want you to elaborate on the kind of economic damage we have seen from the DOE and EPA rules and what has that meant in terms of cost for American families just during this Administration's tenure.

Mr. BATKINS. Sure. Whenever you, you know, hear figures, tens of billions, hundreds of billions, realize that a good portion or at least some of the costs ultimately get passed down to consumers, and that acts as a sort of regressive tax. It almost acts like a sales tax on consumers. And beyond just the consumer angle, there's also the angle of businesses. We've done some research which has found that as higher regulatory burdens increase, you'll actually get fewer small business growths and more deaths from small businesses. And what we have found, which was I think most surprising as the regulatory burdens increase is that we actually found growth in the largest businesses. So not only do these businesses have sort of regressive impacts on consumers through higher prices, higher energy bills, higher utility bills, but it can also impact small businesses as well because they don't have the capital, the ability to, you know, compete with—sometimes with large competitors.

Mr. WEBER. Well, that's great. And I want to move right over to Mr. Bosworth because he and I both ran an air-conditioning company for a long time. And so every time the SEER rating is changed, I can tell you that it makes for—that company is going to have change their advertising, change their ads, they're going to have to train their technicians, they're going to have to bring more

literature in, not to mention that the manufacturers and distributors have to do that as well. And so every time we do that, Jerry, I think—would—have you experienced that it runs your costs up, and then therefore, you have to charge more for that equipment?

Mr. BOSWORTH. Well, the equipment definitely costs more money. That's just the way it is. I mean, every time it's more efficient, somebody gets paid. So with us, with getting more and more higher efficiency equipment, we have to learn how to install it better. We—or actually, we do install it better. We have somebody that has different techniques for the installations.

And—but my biggest concern is is that on—especially on 92 percent furnace, they're a condensing furnace. Right now, the furnaces we install are non-condensing furnaces. And they're 80 percent efficient. When I first got in the trade in 1975, the standard furnace was a 60 percent furnace. It was—40 percent of the heat went out the roof and that's just the way it was. But the repair on the—between the 60 percent furnace and the 80 percent furnace went up dramatically when we started installing 80 percent furnaces.

And, like I said, I don't know about the 92 percent because we've only installed one, and it was only installed for a few years and the customer didn't like it and took it out.

Mr. WEBER. Well, I can tell you, we've looked at them and they're super expensive and not—they don't pay back into Texas. And so what happens is the cost of all of this expensive equipment is going to hurt the low income consumers the absolute most.

And let me just say, you mentioned earlier in your testimony about the Department of Energy. You know, when I was a Texas State Rep, I was on the Environmental Regulatory Committee, and we wanted people on the TDLR, Texas Department of Licensing and Regulation. I'm an air-conditioning contractor. We wanted people on that board who actually knew our business and hopefully had experience in our business. Do any of you all know or are there any members—any of the folks that work for these agencies, DOE or EPA, that has actual business experience in an air-conditioning company? Ms. Callahan, you seem——

Ms. CALLAHAN. I——

Mr. WEBER. —chomping at the bit.

Ms. CALLAHAN. I'm chomping at the bit. I don't know about air-conditioning companies. I'll think about that for a minute. But the gentleman that runs the Building Technology Program, which is where the appliance and standards program sits, is a 30-plus year veteran of Pacific Gas and Electric Company, one of the largest utilities in the country and ran all of their efficiency and demand side management programs and worked directly with manufacturers——

Mr. WEBER. While——

Ms. CALLAHAN. —understands those issues and——

Mr. WEBER. While I appreciate that, I want somebody who's been in those homes looking those people in the face——

Ms. CALLAHAN. Well——

Mr. WEBER. —having to deal with it.

Ms. CALLAHAN. —let me—yes, and let me say that in the process, the way that it's set up—and there's a big ongoing debate on the furnace standard right now and a lot of input coming in. There are

stakeholders sitting at the table working with DOE, manufacturers, the stakeholders working with DOE trying to come to a consensus opinion on this and rate, and so it's a process that's ongoing. They're—those voices are being heard at the table.

Mr. WEBER. I'm running way over out of time so I appreciate that, but let me just say that we want to make absolutely certain that regulations that are promulgated are based on not just the idea that somehow they ought to all be more and more efficient.

And I would add, too, for the record that—and, Jerry, I know you've experienced this in the air-conditioning business—manufacturers, in order to gain a competitive edge, will actually build a better product. They will build a more efficient product. They will build a better product just for competition.

And I'm going to end by saying—quoting one of my favorite speakers, Ronald Reagan. You know, Reagan said somebody who comes along with a better mousetrap, the government comes along with a better mouse.

So anyway, I'm going to yield to the gentleman from Virginia, Mr. Beyer.

Mr. BEYER. Thank you, Mr. Chairman, very much. I'd like to thank the Chair and the Ranking Member for having this hearing in the first place. It's very important. And thank all of you for coming and being with us. And I especially appreciate the perspective from both the majority and the minority that regulations are important and that it's important that we get them right.

I've been in business 42 years, and the—see the impact that OSHA has had, that clean air and clean water and food safety and drug effectiveness and all these incredible things.

But it's also important that we get the balance right in terms of the cost-effectiveness. I remember when I served in the Virginia Senate, one of the proposals was that we get rid of all asbestos in Virginia schools at a cost of $2 billion, and they estimated it would save the life of one child. We said, well, is that the best way to spend $2 billion in terms of children's health? And maybe not.

So let me move on. To Mr. Batkins, your chart I thought was fascinating because I just wanted to point out that the high point was in 2008 when George W. Bush was President, and that the low point over all those years was in 2012 when President Obama faced a very uncertain election against Mitt Romney. So I was glad to see that it was very—presented in a nonpartisan way, that this is not just beating up on President Obama for what you fear will happen in 2016.

Mr. Bosworth, thank you for talking about the unintended consequences of the condensing versus non-condensing furnaces. I loved your line that the false choice between short-sighted solution to repair and maintain old efficiency equipment—inefficient equipment and purchasing new equipment that will never have a positive payback.

Ms. Callahan wrote, and I quote, "The process that leads to standards is informed at every step by stakeholders representing diverse sectors so that negotiations reflect the respective interests of industry and consumers and will have positive effects on the environment." And you just elaborated on that, Ms. Callahan, just a minute ago.

Mr. Bosworth, so you're in the business at the retail level. You said the process is broken. How does your experience differ from what Ms. Callahan talked about in terms of promulgating these regulations? Why haven't this process with industry and stakeholders and consumers not apparently worked with respect to these furnaces?

Mr. BOSWORTH. Well, we already have 92 plus furnaces available. I mean, they're sitting on the shelves ready to be sold. There's just no demand for them, at least in my area and I would think in the Midwest—or not the Midwest but the Southwest there's no demand for them. Maybe in Minnesota, Wisconsin, those areas it'd be nice and would work good. Matter of fact, I used to work in Minnesota where the—most of the furnaces were condensing furnaces. So there is a place for them, but it's not in the whole United States.

Like I said, where I live, air-conditioning is more important and selling higher-efficiency air-conditioning—when it went from 13 SEER to 14 SEER this year, it was no big deal. Everybody wants a higher-efficiency air-conditioning because they pay a high light bill. Their gas bill is minimum.

Mr. BEYER. So your argument would be that the regulation needs to be fine-tuned based on where you live in the country?

Mr. BOSWORTH. Well, I really think it's what people want. It's—consumers will drive the economy. I mean, they'll drive the force towards the 92 percents.

Mr. WEBER. Mr. Beyer, I'm going to give you extra time because I went over so much, but would you yield for just a second?

Mr. BEYER. Sure. Yes. Yes, sir.

Mr. WEBER. I'm thinking really what you're driving at is the idea that somehow one size fits all we would argue that high-efficiency furnaces are probably not going to be popular in Texas. You can't hardly give them away. But, then again, high-efficiency air-conditioners may not be all that popular in Minnesota.

Mr. BEYER. Yes. Yes.

Mr. WEBER. So I yield back. Thank you.

Mr. BEYER. Okay. Thank you. Yes, we sell a lot of all-wheel drive cars after Snowmageddon here, but they're tough to sell in Florida so—Ms. Kerrigan, your—some of the statistics that you quoted, I know you—they're not your statistics, that leaving aside manufacturing, that other firms, 50 employees or less, the full regulatory burden, $11,724 per employee, environmental regulations $3,574 employee, I'm trying to think here because I know my financial statement really well how I could ever get to numbers that high for my employees. The only way I could do it would be to consider the built cost of, you know, complying with fire codes.

I certainly don't think you would want us not to dispose of Freon and antifreeze. I actually remember back in early 1980s we used to pour the antifreeze down the drain. And I called the EPA and they said, well, that's what everyone does. It's—we're in a very different world right now. How much did that $3,574, which I can't imagine is more than about $600, do you think we shouldn't be doing?

Ms. KERRIGAN. Well, that's a very good question. I—you know, I think the—you know, the point of the—including the National As-

sociation of Manufacturers' study, which shows the impact of regulation on small business and the disproportionate impact is that when it comes to smaller firms that—particularly in the manufacturing sector, that it's very difficult to—I mean, they do not have the scale, they don't have the size to, you know, to spread these costs around. And it does cost them more to comply with these rules and regulations.

So I don't have an answer to that, you know, specific question. I mean, I just—from our perspective, I mean, we just want—from a regulatory process perspective, we want the process to do what it's supposed to do in terms of protecting small businesses, to look at the economic impact, to consider their concerns, to mitigate the costs where possible in terms of complying with those rules and regulations.

So—and, I mean, I think both sides of the aisle in terms of—you know, in terms of small business impact and regulation in general, I mean, do agree that, you know, small businesses being sort of undermined, you know, in this process and their voice is not being heard. So——

Mr. BEYER. Well, I'd just like to invite you or somebody from your organization—and I do this with great respect—to come into my business with my daughter or my brother and walk through and see where you could figure out which regulation we should reverse because I can't think of one. I also can't think of one that costs very much so——

Ms. KERRIGAN. You mean on the—in the environmental side or——

Mr. BEYER. Across the board.

Ms. KERRIGAN. —more broadly? I mean——

Mr. BEYER. Across the board.

Ms. KERRIGAN. Oh, okay. Well, I mean—well, there's——

Mr. BEYER. And I'm talking about retail automobile dealerships, you know, as gritty as you get.

Ms. KERRIGAN. Right. Right. Well, I'd love to respond to you in a—you know, get with my staff and my chief economist to provide you sort of maybe what the—but if you look at healthcare regulations, the ObamaCare regulations in terms of tax compliance costs, things like that, I mean there are ways, I think, where we can squeeze these costs and make them less burdensome for small businesses.

Mr. BEYER. All right. Thank you. And one last question. Ms. Callahan, thank you, too, for being so bipartisan in your——

Ms. CALLAHAN. Thank you.

Mr. BEYER. —and reminding us that these things have evolved over decades with Democrats and Republicans working together, which is what we would like again moving forward.

But you also talked about there are ways to make improvements, transparency in data. Can you talk about that for just a minute until the Chairman tells me my time has run out?

Ms. CALLAHAN. Sure. I think it really goes to the point the Chairman's making and Mr. Bosworth, that we need to have the people that are impacted by these regulations at the table. And I actually think DOE does a pretty good job at that. Where we think they could improve is the transparency of the calculations that they're

making. What are the models they're using? How are they coming up with the numbers on cost-effectiveness, on performance? Because often, industry will have very different numbers.

And so if the stakeholders are—they understand and it's transparent what DOE is doing, they can make more informed and better inputs into the process.

We also think that if you vest people in the process and listen and hear them, it's less likely that you're going to have litigation, which causes delays in these standards.

I would say that, you know, so many of the standards—we're talking about a couple that are controversial—most of them are ones that manufacturers have agreed to before they're put into final form. So these are things that the manufacturers are working with the stakeholders and with DOE, and it's a process where air conditioners in Texas aren't a big deal when it goes up to SEER 14.

Mr. BEYER. We just want to make sure the Mr. Bosworths and Mr. Webers are at the table.

Thank you, Mr. Chair.

Mr. WEBER. And I thank the gentleman for yielding back.

I now recognize Dr. Babin from Texas for five minutes.

Mr. BABIN. Yes, sir. Thank you, Mr. Chairman. And thank you, panelists, for being here today.

At last week's full committee SST hearing, we learned that this Administration has apparently been using fuzzy math to justify their promised reductions, 26 to 28 percent reduction of greenhouse gas emissions from 2005 levels at the Paris Climate Conference this past December. It's another example of how far this President's Administration will go to fulfill a politically driven agenda. It is an agenda not based on sound science.

Over the last seven years, this President has pushed some of the costliest regulations in the history of the republic, including the Clean Power Plan, the ozone rule, and Waters of the United States. And in the final year of his Administration, President Obama is eager to push more of his "all pain, no gain" regulations in the same manner in which he pushed his other regulations, with little regard to regulatory process and the underlying science. And more importantly, he shows little regard as to how this would adversely affect senior citizens, the poor, and those living on fixed incomes, as we've heard earlier today.

It's extremely important to invoke all stakeholders in the regulatory process. We heard from the agricultural sector and others that EPA did not meaningfully involve them in the rulemaking process. And now, we have a WOTUS rule that doesn't work for rural America, among others. Many farms and ranches are small businesses. We know that EPA failed to conduct a small business advisory panel, a SBREFA, to calculate the impact that the WOTUS rule will have on small businesses.

So my question is, Ms. Kerrigan, in your capacity with the Small Business and Entrepreneurship Council, what are your thoughts on this procedural failure and the impact that the WOTUS rule will have on our small businesses?

Ms. KERRIGAN. Well, the procedure was a huge failure, I think, from a small business perspective. It was a travesty. The—well,

there's been this and then other major rulemakings as well where it's obvious that the EPA is not taking its legal responsibilities under the Regulatory Flex Act and its legal responsibilities to—on the impact on small businesses.

But—and the SBA Office of Advocacy, which is a watchdog for the RFA and for small business in the regulatory process, called them out. They said the EPA should pull the rule, begin again, and they did not. But even their economic analysis that the EPA did showed that it would have a pretty significant impact on small businesses. But their certification where they said it would not impact small business obviously contradicted their economic analysis.

So that's very disheartening to small businesses in terms of the process failure. A law that was meant to protect them and where they feel they have some voice and input into the process is totally broken, and obviously we need to fix that.

And, you know, in terms of the impact the agricultural sector, the home-building sector, you know, any type of business that's looking, you know, to build out and expand its facility, a lot of the economic development projects that you see happening not only in—you know, in inner cities but in rural America, I mean, this is going to have a huge impact in terms of costs or the ability for any of these projects to move forward.

So—but we're happy to see that it's in the—we shouldn't have to go to the legal process, obviously, the courts, where we are right now. I mean, EPA should just do this. They should take their job responsibilities seriously.

Mr. BABIN. And if you don't mind, I'd like to follow up real quickly. Has this been a procedural failure by EPA to conduct a SBREFA panel with other regulatory rules, not just WOTUS?

Ms. KERRIGAN. Well, with the Clean Power Plan, there was a very hastily arranged last-minute, you know, type of panel that they put together. I think they were sort of shamed into that, but it really did not have a meaningful agenda, and obviously, they didn't consider the impact on small business.

Their—in the Tailoring Rule, that was another instance where they—in their economic analysis or in their analysis they found that six million small businesses would be impacted, you know, by that regulation, yet they certified that it would not. So, yes, there's been several instances.

Mr. BABIN. Absolutely. Okay. Thank you so very much.

Thank you, Mr. Chairman, and I yield back.

Mr. WEBER. The gentleman yields back.

The gentleman from California, Mr. Swalwell, you're recognized for five minutes.

Mr. SWALWELL. Thank you, Chair, and thank you to our witnesses.

And I wanted to start first with Ms. Kerrigan. Ms. Kerrigan, in your statement to the Committee, on page 2 you state in the third paragraph, if I'm correct, "Regulation and the threat of new regulation continue to be a major issue of concern for our members." Is that right?

Ms. KERRIGAN. Yes.

Mr. SWALWELL. This is not the first time you've come to Washington to, I would say, argue that regulation of an industry is burdensome, is that right?

Ms. KERRIGAN. Yes.

Mr. SWALWELL. And, in fact, in 1997 you were on the federal legislative team for Philip Morris, is that right?

Ms. KERRIGAN. No.

Mr. SWALWELL. Have you ever——

Ms. KERRIGAN. I am—I'm—I am President and CEO of the Small Business and Entrepreneurship Council. We are an organization that represents small business owners. And I have been in this capacity for more than 20 years.

Mr. SWALWELL. Would it surprise you, Ms. Kerrigan, if in its Good Science Project Plan in October 1997 Philip Morris listed you as part of four people on its federal legislative team?

Ms. KERRIGAN. Yes.

Mr. SWALWELL. Okay. And would it surprise you if Philip Morris said that they intended to call as a witness to the Senate Environment and Public Works Committee Hearing Karen Kerrigan with the Small Business Survival Committee and ask her whether she would consider testifying? She's done some very good work, having several letters to the editor published on OSHA issues?

Ms. KERRIGAN. Well, that might not surprise me in terms of a—being invited to a committee and perhaps having a corporation recommend, you know, if they're working with staff that I testify before the committee.

Mr. SWALWELL. But putting you on their federal legislative team would have been done without your permission?

Ms. KERRIGAN. Yes.

Mr. SWALWELL. Okay. And the Small Business Survival Committee did in fact back in the late '90s receive money from Philip Morris, is that right?

Ms. KERRIGAN. Yes. We have a variety of corporate partners——

Mr. SWALWELL. And——

Ms. KERRIGAN. —who support our organization.

Mr. SWALWELL. And, Ms. Kerrigan, in 1999 on March 23, you sent a letter to Majority Leader Lott at the time stating that "America's tobacco industry is a legitimate one." Is that right?

Ms. KERRIGAN. I did probably. I mean, I—I mean, it was a legitimate industry so—I have to look at what the context of the letter is, though. If I could see that letter and if you have access to it, I'd——

[Slide.]

Mr. SWALWELL. Behind you and to your right you'll see the Good Science Project Plan. That's Philip Morris's Good Science Project Plan where they list you, and you can see your name is highlighted in a red box, Karen Kerrigan, as being a federal legislative team member.

Ms. KERRIGAN. Right.

Mr. SWALWELL. And would you call tobacco something that is good for science or good for health?

Ms. KERRIGAN. I wouldn't call it good for health, no.

Mr. SWALWELL. Okay. Thank you. No further questions, Chair.

Mr. WEBER. I thank the gentleman. That was an interesting exchange, but we do want to be a bit more current and on the issues here today, I think. So I'm going to recognize the gentlelady from—I'm going to recognize the gentleman from Illinois, Mr. LaHood, for five minutes.

Mr. LAHOOD. Thank you, Mr. Chairman, and thank the witnesses for being here today. And I want to thank Chairman Smith for having this hearing today.

There was some references earlier on, you know, why we're having this hearing and the reason for it, and I would just tell you in my district when I talk to small and medium-sized businesses or I talk to farmers or healthcare providers or people in business, it's the number one issue that they talk about in terms of regulation, the overreach of the federal government, and, you know, the biggest hindrance to growing their small or medium-size business.

And, you know, when you also look at these regulations and the overreach, you know, from the standpoint—we've heard some arguments on, you know—from the other side on how these regulations make sense and we all want clean water and clean air, which we all share in that, but I think the other part of this is you look at what these lawsuits that have been filed in federal court, we look at yesterday the Supreme Court ruled—you know, put a stay on the climate rule, which is significant, basically let these lawsuits go forward, stopping that in its tracks.

You look at the Waters of the United States regulation, two federal judges, one in North Dakota, one in Cincinnati, have issued injunctive declaratory judgments on them basically saying these need to be stopped. They cannot go forward. And I think that's—if you look at the legal reasoning there, it's because of the overreach and the violation of laws here.

You also look at the executive order on immigration that has now gone to the U.S. Supreme Court because the Fifth Circuit underlying that has ruled that that appears to be unconstitutional, the point being that, you know, when you look at what this Administration has done particularly in terms of, you know, the regulation, the over-compliance, the—you know, the standards that have been put in place, and I think what I hear is, you know, there has not been a balanced kind of reasonable approach on this, working with business and industry. That seems to be the common theme.

And the question was asked earlier, well, what rule would you reverse? I think it should be asked from the standpoint of what could be put in place so that you have a dialogue and a discussion on how you work together to implement these rules to make it easier on business?

And, Mr. Bosworth, I commend you for engaging in the business you are and trying. It's a tough environment to do that.

But I guess for you, Ms. Kerrigan, in terms of a more balanced, reasonable approach in working with business on implementing these rules, you know, whether you could comment on that.

Ms. KERRIGAN. Well, I think it all starts at the beginning of the process, the federal regulatory process. And you're right, there needs to be a balance. I mean, regulation is essential to the functioning of our society, to the environment, to health, to the free market, to business, to job creation.

But—and there has been protections in place in law where that type of small business input and engagement, along with the economic analysis and the analysis that's supposed to take place, to look at what the impact will be on small businesses. I think the dialogue needs to take place before the rule is proposed. And in fact, in January of 2011 when the President issued his executive order on regulation, which built on Clinton's Executive order, I mean, that was one of the pieces that he put in there, that regulations where it's appropriate and where it's feasible should bring in stakeholders, small businesses, other groups at the front end of the regulatory process before the regulations are even proposed.

Mr. LAHOOD. Well, and I would follow up with Mr. Batkins on this. You know, at the end of your testimony you talked about what we need to do to reform this or change this. I mean, clearly, when you hear of a midnight regulation, that frightens every business owner when you've had an election that has occurred, and then between the period of time of an election and when somebody gets sworn in that you're going to have all these regulations come forth when there's really no accountability, right? Nobody is being held accountable. And that's what's scary and is what makes people very cynical about government, that exact phraseology. And then you see what's occurred.

So you mentioned in terms of reform, moratorium, but are there other things that are more substantial that can be put into place to kind of stop this mentality?

Mr. BATKINS. Sure. I mentioned that Congress has under consideration the ALERT Act, which would basically allow sort of posting on the internet a regulation for at least 6 months before it can go into effect. There are some regulations that we've studied where there's been an economically significant regulation imposed before it was even published in the Unified Agenda, period, and very little in the way of public feedback.

And I'll give you one example. From the 2000 midnight period, there was a Department of Energy regulation which was proposed in October of 2000, published in the Federal Register the following January 2001. The entire rulemaking history was less than the comment period for the Clean Power Plan. So that's how quickly some rulemakings can move through the process, in the matter of a few weeks.

Mr. LAHOOD. Thank you. Those are all my questions, Mr. Chairman.

Mr. WEBER. I thank the gentleman for yielding back. And seeing that the minority side has no other witnesses, we will now go to Barry Loudermilk of Georgia.

Mr. LOUDERMILK. Thank you, Mr. Chairman. And thanks to the witnesses being here. I've got a couple of questions, but first, I was—as we were listening to the testimony, I was reading over the testimony and I started wondering when does the madness actually come to an end? And as a small business owner for 20 years, I experienced the impact overregulation has on the small business community, whether it be environmental regulations, it being the IT business, affected my customers, whether it be health regulations brought on by the Affordable Care Act, which affected my cus-

tomers, or whether it be Dodd-Frank, which affected everyone. I definitely saw the impact of overregulation.

But as I was reading over some of the testimony here, something—a question came to me as who gains? Who's going to gain from all of this? We had testimony here in this Committee that the average American family, the average American family pays $15,000 a year in hidden regulatory cost. Another report said that the 60 percent, 60 percent of the cost of a new home is due to government regulation.

So I'm wondering with all of this who actually gains, and then I read something in Ms. Kerrigan's testimony, which may indicate who gains from this. It was dealing with the Waters of the United States. When—I think the testimony said that there'll be $158 million in new permits that I would assume the EPA would be collecting those funds. So I think it's clear who gains in some of this regulation. It's not the consumer, it is not the individual citizen, it's the government. The government is the one that gains. But on to my question.

I did find a ray of hope as I was reading over the—I hope there's a ray of hope here as I was reading over some of the written testimonies. And Ms. Callahan writes in her written testimony "Many stakeholders would like the U.S. Department of Energy to find ways to increase transparency with respect to the data and models it uses to make performance and energy-saving calculations. More transparency could help stakeholders make more informed contributions to the standards process and perhaps, more importantly, help prevent situations that lead to litigation and delay. Simply put, process pays dividends beyond energy savings."

This is refreshing because definitely we need—we need more transparency, and if—what I'd like to ask of Ms. Kerrigan, Mr. Bosworth, and Mr. Batkins is are you seeing more transparency? Do we need to look for more transparency? Because, let me tell you, even with subpoena power, this committee is having a hard time getting transparency from these agencies, especially the EPA, who fails to respond to our requests for their data, for their models, for information. And so my first question is do we need—do you see a need for more transparency? And are these agencies looking? Ms. Kerrigan?

Ms. KERRIGAN. Yes. I mean, we definitely need more transparency, I think, on the economic analysis side, the scientific data, I mean, all the data and the technical information that's being used to justify the regulations. And in terms of if we're seeing any more, I'm not quite sure. I don't think so. Again, we were—we had some hope with President Obama's Executive order in January of 2011, which again said that we are—that scientific and technical information, I mean, the goal was—I think there was actually a requirement and where possible to begin moving this stuff online so that everyone can see it on Regulations.gov so the regulatory—regulated community could also see it.

But as you noted, with subpoena power you're not getting this data——

Mr. LOUDERMILK. Right.

Ms. KERRIGAN. —and I think—I mean, the ozone rule and the underlying data in that very significant regulation—I know you've

subpoenaed for that information and you're not getting it. So I don't see any sign of transparency——

Mr. LOUDERMILK. Well, thank you. Since I'm——

Ms. KERRIGAN. —in that regard.

Mr. LOUDERMILK. —running out of time, let me skip to the second question——

Ms. KERRIGAN. Sure.

Mr. LOUDERMILK. —and hopefully, we can get the other two to weigh in on both of these is even with subpoena power we're having a hard time getting transparency. So as we bring these stakeholders in for these meetings, are they having the transparency? And as I—as some of the testimony says, this—again, Ms. Callahan writes, "These standards are proof that even when dealing with the biggest impacts, regulation in this context can work and result in the benefits to all stakeholders." By saying we're bringing them in, the stakeholders buy into this, but are the stakeholders getting the information they need, and is the choice that they're given equating to would you rather be shot or hung and not giving a third option? Mr. Bosworth?

Mr. BOSWORTH. To be quite honest, I am not in the political atmosphere of all this stuff, so this is not really my expertise.

Mr. WEBER. Count your blessings.

Mr. BOSWORTH. So I'm going to have to just——

Mr. LOUDERMILK. Okay.

Mr. BOSWORTH. —defer on this one.

Mr. LOUDERMILK. Mr. Batkins, would you like to weigh in on either of those?

Mr. BATKINS. Sure. I mean, there's always—I think what you fear, especially, like I mentioned, when you're dealing with these multimillion, multibillion dollar regulations, you don't want that unknown. If a regulation is getting finalized and industry still has questions and there might even be some uncertainty—a great deal of uncertainty for regulators, you don't want that degree of unknown.

And what's more troublesome is that, you know, we're sort of issuing hundreds of regulations, and the number that actually we go back and look at and determine whether or not they were effective or not is on the area of 1 or two percent. I mean, Congress has the benefit of passing a budget and going back and seeing whether or not programs were effective. On the regulatory side, it is really just sort of a black hole of information.

Mr. LOUDERMILK. Is——

Ms. CALLAHAN. May I make a comment, Mr. Loudermilk, since you're quoting my testimony? Can I comment on this as well?

Mr. LOUDERMILK. Sure. And then I'll yield back, Mr. Chairman, after——

Ms. CALLAHAN. Okay.

Mr. LOUDERMILK. —her comments since I'm out of time.

Ms. CALLAHAN. Okay. I just want to say that narrowly focused on the energy efficiency standards that are being set by the Department of Energy, I want to remind you what's also in my testimony is that Department of Energy is just executing the job that it's been given by the Congress, and it sets regular timelines and dates for looking at updating standards. Sometimes they demur.

They believe—and they have to make a designation that it's not time to increase that energy efficiency standard, and they did that. They did that last year, they did it the year before, we expect them to do it again this year.

It's a three-year process typically, and it engages stakeholders from the beginning of the process so——

Mr. WEBER. Ms. Callahan, I hate to cut you off, but I've got to go to the gentleman from Florida, Mr. Posey. We're running out of time.

Mr. Posey, you're recognized.

Mr. POSEY. Thank you very much, Mr. Chairman.

Most people think Members of Congress make all the laws. In my office, four years ago we started collecting the daily register that's delivered to every Member of Congress, 435 Members of Congress, 100 Members of the Senate every day—excuse me—of the executive orders, rules, proposed rules, changes in rules. And I ask people how big do you think that stack is now? And I get answers, you know, from like four feet, six feet, eight feet, ten feet. Well, it's seven stacks over my head now, and that mostly is laws made by unelected people, unelected bureaucrats. It shocks a lot of people, but that's the very issue we're talking about here.

Ms. Kerrigan and Mr. Batkins, how do EPA and DOE regulations hurt those who live paycheck to paycheck, for example, senior citizens or others who may be on a low income level? Ladies first, time is wasting.

Ms. KERRIGAN. Sure. No, sorry about that. Well, cost. I mean, you know, look at—we—it's a very difficult economy. I mean, there is—you know, in terms of wage growth is not growing. There's a lot of cost and, you know, with—for example, under the, you know, Clean Power Plan, if you're going to have electricity costs that are going to be jacked up anywhere between, you know, 5 or 20 percent depending upon which country—which part of the country you live in. I mean, this is—that's real money. That's real money.

And in sectors, too, for example, you know, the whole coal industry and some of these mining towns that are being wiped out. I mean, the small businesses and their employees because of—you know, because of rules that are—you know, that are affecting coal.

So it impacts—it has a very, very difficult—a regressive impact I think, you know, particularly on low-income and middle-income people.

Mr. POSEY. Okay. Thank you. Mr. Batkins?

Mr. BATKINS. Sure. I mean, I would echo those comments as well, noting that, you know, the—a lot of the research that we have today shows that not everyone along the income ladder benefits the same way from EPA or DOE regulations. And—but when the regulations are promulgated, they sort of assume homogenous consumer and that's not always the case. Our consumer preferences are different. Our time series are different. Our income streams are different. So, yes, a lot of these regulations can have regressive impacts.

Mr. POSEY. Do—and back to Ms. Kerrigan and Mr. Batkins, do you foresee any downsides from a healthcare perspective?

Ms. KERRIGAN. You mean, you know, I guess dis-benefits if you will to——

Mr. POSEY. Yes.

Ms. KERRIGAN. —you know, individuals impacted by these regulations? I mean, certainly, it's very—if you lose your job, I mean, you know, that has an impact on access to healthcare, it has an impact on your health in terms of stress and everything that goes along with that, in terms of your ability to provide, you know, for your children and your family. I mean, that's one thing that comes to mind.

Mr. BATKINS. Sure, there was actually an EPA regulation which was issued, I believe, I in 2011 or 2012, and in it EPA forecasted $52 million in environmental dis-benefits was the term that they used from dirtier air and dirtier water, which was a bit of a surprise coming from EPA. There is actually some research on employment dislocation and what that means for mortality and morbidity going forward. And researchers found that employment dislocations can lead to a 15 to 20 percent jump in mortality the 20 years after a dislocation. So in a sense it can all be connected.

Mr. POSEY. I hear from a lot of senior citizens—and I have quite a few in my district—that the pressure is on them to choose between medication and paying their utility bills. Is that a common thread that any of you have seen among seniors?

Mr. BATKINS. I mean, I don't study at that sort of granular level, but I can understand certainly, you know, how that would be the case. When you're talking about, you know, in some instances a regulatory tax of a few hundred dollars, there are going to have to be some tradeoffs made, and I can certainly see that taking place in the real world.

Mr. POSEY. Okay. Mr. Bosworth, could you give examples from your business experience about how excessive regulations have resulted in unintended consequences?

Mr. BOSWORTH. Well, with the energy efficiency standards going up and up, we have seen where we've been pulling out like 10 SEER equipment and trying to install 13 and 14 SEER equipment in a spot and it won't fit. If you go to—all of you all have homes and all of you all have furnaces and air conditioners at your home. You go take a look at your furnace and see what's—where it's sitting. It's sitting usually in a closet or in the basement and it's usually got walls built around it because nobody wants to see them.

The problem comes is when it needs to be replaced and you go to like a condensing furnace. Well, a condensing furnace is probably about a foot taller than the standard non-condensing furnace. So then you've got a height——

Mr. WEBER. And you've got to deal with the condensate.

Mr. BOSWORTH. You've got to deal with the condensation because it's got an acid-based condensate on it and it can't go into a cast iron drain. It's got to go into a PVC drain. So there you have to do some plumbing.

Then you have venting. If you stand—if you change out a standard furnace, you have what we call B vent aluminum piping or steel piping that we vent through. These—now, for these condensing furnaces, they use PVC pipe. And then again, if your unit is in the basement and you're in a—or you're in a basement that's been made into a bonus room or something, you have a ceiling that

you might have to remove in order to—or tear a piece of it out in order to run vent pipe.

Or if you're in a closet, you might have an issue to where the vent pipe doesn't go straight up. It might go over and up and you still have to do some carpentry work in order to get this system installed.

Mr. POSEY. But they had the best of intentions when they wrote the rule.

Mr. BOSWORTH. Well, you know, that's what I mean. The equipment itself, you're looking at adding about $600 to the job cost, marking up, you looking at a couple hundred bucks, but then you're looking at the construction work that might be required to install this system, and the sky's the limit.

Mr. POSEY. If you'll indulge one more question, on automotive air-conditioning, we had to get rid of Freon and we have a replacement now.

Mr. BOSWORTH. Yes, we went from R–12 to 134a.

Mr. POSEY. You know, I'm told you could, you know, breathe all the Freon you want, too, and it won't hurt you.

Mr. BOSWORTH. Well, it'll get you high.

Mr. POSEY. It'll get you high? We better not——

Mr. WEBER. We probably want to strike that——

Mr. POSEY. —broadcast that.

Mr. WEBER. —from the record.

Mr. POSEY. Yes. But I'm told if you breathe the replacement stuff, it can kill you.

Mr. BOSWORTH. Well, the replacement stuff we have now is—we don't breathe it; we reclaim it. And that's what I was talking about Section 608. Most of us that are ACCA contractors are premium—we try to be premium contractors. We abide by the rules. We reclaim the refrigerant. We take it to a disposal site or a recycling site. But there's a lot of contractors who are what I call bottom-feeders——

Ms. CALLAHAN. Right.

Mr. BOSWORTH. —who——

Ms. CALLAHAN. That's a great word.

Mr. BOSWORTH. —will go and they'll install a condensing unit, they'll take the old unit back to their garage or their house or whatever and they'll just slowly vent it out on the way home. So some of these EPA rules, which are—which I believe in; I think they're good. They're good for the environment, but a lot of them are being ignored because there's no bite to it.

Mr. POSEY. Okay. Thank you, Mr. Chairman.

Mr. WEBER. Mr. Knight, you're up.

Mr. KNIGHT. Thank you, Mr. Chair.

I have a couple things. One I'd just like to state for the record because I know this was said about Aliso Canyon earlier today that we have called for a Congressional committee on the gas leak in southern California. It is in my district. Hopefully, we will be capping that in the next week or so. And I have put forward a piece of legislation that will be a baseline of regulation from the federal level. So not all regulations are bad. There should be a baseline. But in that there's about 30 states that have to deal with under-

ground piping, and they should be the authority and they can build regulation and legislation around that.

A couple things I wanted to bring up, though. You know, I think everyone goes around their district and they talk to businesses and businesses say, "regulation is killing me," "it's hurting me," "it's taking away from my bottom line," or "I'm having to pass along to the customer" or whatever, but then we don't hear specifics.

And we had a bill earlier this year by Representative Smith about the—called the SCRUB Act. And it was talking about regulations that might not have been looked at over years or have been outdated or looking at the hundreds of thousands of pages that we have on the books already and why can't we look at some of these regulations and maybe get rid of them.

When I was in the state legislature in California there was a state in the south that had just gotten rid of their law that you couldn't leash your alligator to a fire hydrant. That probably had gotten outdated. I don't know when that was dated, but at some point somebody said that was no good anymore.

So what do we do about this, Ms. Kerrigan? How do we find certain regulations from industries or how do we get industries to come forward and say this is hurting me? And I'm going to give you a little follow-up on that here in a second but I want to let you start with that.

Ms. KERRIGAN. Well, I think the SCRUB Act is a good idea, and I think legislative efforts or the—anything that we can do, I think—or Congress can do to reassert its authority in this area is needed. I know over in the Senate and in the House actually there is bipartisan legislation that would establish a legislative commission to do just that, to, you know, look at all the rules and regulations, see what needs to be not only repealed but modified, changed, updated, modernized, whatever. And I think that's a really good idea because you will get the input from a wide array of stakeholders on that.

Mr. KNIGHT. And that's exactly what I'm looking for. I need the Mr. Bosworths to come forward and say, you know, these are the regulations. This is what I have to do on a daily basis when I shouldn't have to do this on a daily basis. If we did this on a monthly basis, if we did these reports on a monthly or biannual basis, it would still cover what we need to. But since I have to do them on a daily basis or a weekly basis, it's costing me time or I have to hire somebody and it's taking six hours out of their week.

Recently, we've seen a decision that I've written a letter—and we've gotten 108 Members on this letter—about the decision to raise the $23,000 of—where you have to pay overtime, and they're raising it to over $50,000. At that point you're going to hurt small business. You're going to impact them, and that's why we've gotten so many small businesses and so many organizations to sign on to this letter.

But that's something that we can identify. We can say if you take that $23,000 overtime limit and you raise that to $50,000 now everyone under $50,000 has to be paid overtime, I can actually point to that and I can actually say this will detrimentally hurt small business.

So that's what I'm kind of asking for homework is, especially some of these industries—you know, I come from California, so we over-regulate pinball machines. So I know that some of these folks come from states that don't do that, but the farming industry in California and the farming industry across this country is detrimentally hurt. Many of the small shops that work on cars, that work on houses are hurt beyond belief. And it gets passed onto us.

So what I'm going to ask is if we can look into some of these industries and maybe help us, maybe help us with a list because I do believe that regulations can help. I do want clean air, I do want clean water, I do want clean working conditions, but I also want to be able to buy products at a price where I can afford them and a middle-class person can afford them instead of sitting at home saying I just can't afford to do that so I'm not going to do it or I'm not going to be in compliance because I can't afford to do it or the small business person that says if I do that, my business goes under.

Those are the things we hear on a daily basis, and those are the bad stories that we hear, I'm not going to comply with the law.

So the last question I'll ask to Mr. Batkins is how often do you hear that, that we just—well, you probably don't hear that we don't comply, but how often do you hear stories that people just don't comply with the law because, one, there is no bite to the law; or two, it'll just put them out of business?

Mr. BATKINS. I mean, quite frankly, frequently. I mean, we have I think over 176,000 pages of regulation. And I know a specific example for the new silica standard which is being drastically lowered. It's currently at the White House——

Mr. KNIGHT. I know this story well.

Mr. BATKINS. It's currently at the White House now, and OSHA has said that, you know, they don't have—they haven't fully enforced, you know, the old standard. They don't know that 100 percent of businesses are currently running—are in compliance with the old standard. So when you have 176,000 pages and tens of thousands of regulators, obviously, you will get some instances where there is non-enforcement, and then that won't stop a regulator from going back and tightening the standard further.

Mr. KNIGHT. Thank you, Mr. Chair. I just wanted to say one more comment. If we do regulations that have no bite, that have no enforcement, why would we do that? Just for the people that have good morals and good ethics that are going to do it on their own, that's fine, but we also know that if it's going to kill the business or if it's going to damage them in such a way and there is no enforcement, then we should probably think about that, too.

Thank you, Mr. Chair. I yield back.

Mr. WEBER. I thank the gentleman. Alligators leashed to fire hydrants? What, did the OSHA mandate stronger fire hydrants?

Mr. KNIGHT. I'm surprised California didn't pick it up.

Mr. WEBER. Okay. All right. The gentleman from Alabama, Mr. Gary "Roll Tide" Palmer is recognized for five minutes.

Mr. PALMER. Thank you, Mr. Chairman, especially for that appropriate salutation. We'll try to make sure that Alabama stays on the radar for years to come unless they're regulated out of it.

Let's get back to the issue at hand. I know everybody's tired of questions and answers and—but a couple of points have been raised that I want to come back to. And there's two things about this whole issue of midnight regulations and really about how we're doing regulations, but particularly this idea that the executive branch, by executive fiat, can make law outside the legislative process. You lose transparency; you lose accountability. So that's one aspect of it. It's a constitutional aspect. And if we're going to have a constitutional government, we've got to get back to Congress making law rather than the executive branch bypassing Congress, making law through agencies.

But there's also the economic consequences. Ms. Kerrigan, there is a report out of Brookings, came out in May of 2014 that indicated that business dynamism is in decline. Have you seen that in your field of work? And here's a slide from that report that I want to draw your attention to.

[Slide.]

Mr. PALMER. That's a pretty severe slide over the last few decades.

Ms. KERRIGAN. Yes. I have seen that, and I've seen some other reports with Census Bureau data showing the same thing.

Mr. PALMER. Well, I'm going to get to that in a moment. That's a little bit different. This indicates some stagnation in entrepreneurism.

Ms. KERRIGAN. And new business creation——

Mr. PALMER. Yes, new business——

Ms. KERRIGAN. —correct.

Mr. PALMER. —creation. And in respect to this, how much of this is—do you think is attributable to regulation not just by the federal government but at every level?

Ms. KERRIGAN. I can't say what—how much, but I do think it does impact. I mean, certainly, I think that the weak recovery, there is an economic—there is a regulatory drag where we haven't had a robust recovery, that regulations have played into the uncertainty where there's a lack of investment, business growth, people taking risks, et cetera. And if you don't have a competence that there's going to be a strong economy, then that's going to impact people willing to start businesses.

Mr. PALMER. Well, that's the whole point is, for instance, Dodd-Frank. We've only issued half of the regulations that will come out of Dodd-Frank. And if you look at all of the regulations that have been issued, all the pages of regulation during the last seven years, for instance, I think it's somewhere north of 25,000 pages, Mr. Chairman, and that includes all the regulations related to ObamaCare, somewhere north of 25,000 pages. But Dodd-Frank by itself right now is over 27,000 pages.

So we have an environment that is not conducive to risk-taking, it's not conducive to capital investment, and as a matter of fact, there's—I think Mr. Loudermilk mentioned it—that the cost of regulations on our economy last year was right around $2 trillion. That's a little over $15,000 per household. Some people say that's a hidden tax. Well, it's not a tax. I mean, at least a tax goes to fund something.

Mr. LOUDERMILK. And it ain't hidden.

Mr. PALMER. And it's not hidden. It's buried in everything that you come in contact with, and it's killing us in terms of disposable income that would go into the economy and in terms of investment capital that could go into business startups. And it's had an impact on business growth. The United States, in terms of other industrialized nations, we don't rank in the top two, three. We're not number five. We're number 12. We're behind Hungary.

There's another slide I'd like for the committee staff to put up. [Slide.]

Mr. PALMER. This is where we are in terms of businesses starting versus businesses closing. Prior to 2008, on a regular basis we had 100,000 more businesses start up than closed. From 2008 forward, we're now running at 70,000 more businesses closing than starting up.

And I just—you work with small business. I just want to ask you to—again, to comment on this and how this uncertainty that we've created with an overregulated economy not only again at the federal level, the state level, the local level is a driver behind this.

Ms. KERRIGAN. Well, I mean, certainly the Great Recession had a huge impact on business closures and bankruptcies and all of that. And I—as I noted in my written testimony, one in five small business owners say they haven't fully recovered from the recession. So you know that they're operating under very difficult conditions and there could be something that, you know, it could be a regulation potentially that can put them under.

But I do think there is—again, there's a regulatory drag. I mean, you do mention the Dodd-Frank Act. I mean, there has been legislation that was signed by the President that we supported to allow for equity in debt-based crowdfunding, to improve capital formation and all of that, but, you know, capital access is still very difficult to come by, particularly for startup and high-growth firms.

So I think 2016 will be an interesting year because, you know, businesses still continue to have this same outlook in terms of weak sales and they're not confident in terms of where the economy is going. And you have to have that confidence and that momentum, that traction in the economy and strong growth, I think, to reverse that chart.

Mr. PALMER. Having come out of a think tank environment working in a think tank world for 25 years, I'm very much data-driven. But I'm also informed by what I hear on the street. And I constantly run into people who talk to me about the regulatory environment, the uncertainty, and how difficult it is today to start a business. And I've literally heard guys tell me that they're going to shut their business because it's just not worth it anymore. I've heard guys say I was thinking about expanding; I'm just not going to do it because it's just not worth it anymore.

And this is a huge issue, Mr. Chairman. I thank the committee for having this hearing, and my time is expired. I yield.

Mr. WEBER. I thank the gentleman.

And I do want to say also that I thank the witnesses for staying on topic to the issue at hand. And actually, I would note for the minority, we hope that going forward the minority would focus more on the substance of the hearing rather than on the background or actions of any witnesses.

Ms. Kerrigan, I'm sorry you had to endure what I believe was a pretty staunch cross examination. I guess if I was doing it, I would say there's probably times in some of the witnesses' lives where they even drank beer in college. I won't ask you to raise your hand, and maybe even too much of it, and maybe I should ask up here for them to raise their hands.

But anyway, we do appreciate you all being here. I thank the witnesses for their testimony and the members for their questions. The record will remain open for two weeks for additional written comments and written questions from the members. This hearing is adjourned.

[Whereupon, at 11:54 a.m., the Committee was adjourned.]

Appendix I

Answers to Post-Hearing Questions

ANSWERS TO POST-HEARING QUESTIONS

Responses by Ms. Karen Kerrigan

Questions for the Record Responses To

The Honorable Lamar Smith (R-TX)
Chairman
U.S. House Committee on Science Space and Technology

From Karen Kerrigan
President & CEO
Small Business & Entrepreneurship Council

"Midnight Regulations: Examining Executive Branch Overreach" Hearing
Held on February 10, 2016

Question 1. What are effective ways to identify, streamline, reduce and eliminate duplicative and unnecessary regulations? Could you comment on on-going efforts and initiatives at the state and national level? How can we best approach this at the federal level, and do you have specific recommendations at this time?

This is an important question Chairman Smith because reforms are desperately needed to identify, streamline, reduce and eliminate duplicative and unnecessary regulations. Cumulative regulation is taking a toll on small businesses, and significant new federal rules are in the pipeline for 2016. In addition, agencies are still implementing and changing the rules of major pieces of legislation like Dodd-Frank and the Affordable Care Act.

I believe you are aware of our organization's support for reforms that have either passed the House, or legislation pending to improve the accountability of the regulatory process. For example, we believe Congress must provide a stronger check on federal agency actions via a REINS (Regulations from the Executive in Need of Scrutiny Act)-like process where Congress votes up-or-down on major rules, or a congressional commission as proposed in the bipartisan "Regulatory Improvement Act of 2015" (H.R. 1407 and S. 708) to examine government regulations and identify those that need to be modified, consolidated or eliminated. We envision that through this process, all stakeholders can have input and provide examples of specific regulations that the commission should consider for modification, updating or repeal. This is the type of engagement and specificity that Congressman Steve Knight spoke about during the hearing in terms of a process that would help both he and House colleagues identify, understand and possibly take action on federal regulations.

We believe there is much to be gained by fully engaging the private sector in government efforts to reform or change specific regulations. The more that small business owners and entrepreneurs can engage in specific areas, the better the outcome in identifying specific regulations as potential candidates for appropriate action. For example, through the Securities and Exchange Commission's (SEC's) Annual Government-Business Forum on

Small Business Capital Formation, scores of common sense changes have been identified over the years through a consensus-driven process at the forum. The report of the forum, which includes specific recommendations regarding rule changes, is sent to Congress each year. Unfortunately, a number of the recommendations have not yet been considered by SEC Commissioners. Understanding this, the House passed the Small Business Capital Formation Enhancement Act (H.R. 4168) in late February by a vote of 390-1, which would require the Commission to act on these recommendations. The Senate has put H.R. 4168 on an expedited track for action. I believe this model for identifying and reaching consensus on specific recommendations for regulatory changes (the SEC Annual Forum approach) is one that can be adapted by other federal agencies for engaging the private sector. A bipartisan congressional commission (as structured within H.R. 1407, S. 708) could then consider the recommendations that come from private-public engagement, as well as those that come directly from the public or the agencies themselves.

The Global Mindset is All About Reform

I have traveled quite extensively across the globe to help business leaders and governments institute regulatory reform changes that will encourage entrepreneurship in their countries, improve investment, and help small businesses grow and create jobs. Both emerging and developed nations are working hard to improve their policy ecosystems for small businesses. Our elected officials and government leaders need to be aware of the dramatic changes that are happening worldwide and to take action here in the U.S. to ensure our business climate is competitive. There are scores of examples of such reform efforts that have been implemented, and I would be happy to provide additional follow up to the committee regarding the scope and scale of these initiatives. For example, the Australian government's "Cutting Red Tape" initiative includes best practices for regulators along with a proactive approach to identify needed regulatory changes. Thousands have been recommended. The House of Representatives, working alongside government and administration officials, schedule regular "repeal days" to act on recommendations. To date this relatively new initiative has reduced $4.5 billion in compliance costs for businesses, community organizations and individuals.

Small Business Input

With respect to listening and considering the views of small businesses during the regulatory process, federal regulators need to take their responsibilities under the Regulatory Flexibility Act (RFA) more seriously. As I noted in my written testimony, some agencies either ignore their statutory obligations, or certify regulations will have no small business impact even though their own analysis reaches the opposite conclusion. Given their limited resources, the SBA Office of Advocacy has done a solid job of reporting on these findings and communicating with regulators about what they should do when they fall short of their RFA responsibilities. Still, and unfortunately, regulators move forward with their final rules without taking corrective action. SBE Council strongly supports the Small Business Regulatory Flexibility Improvements Act (H.R. 527), which would strengthen the RFA in areas where it has been undermined, including: the opportunity for small business to have greater input, requiring more detailed analysis of proposed

regulations, expanding the scope of the required economic impact analysis to consider effects that are indirect and foreseeable, and making sure agencies regularly review regulations already on the books for their economic impact on small businesses. SBE Council also supports strengthening the Office of Advocacy's role by expanding SBREFA panels to all federal agencies, and moving the Office of Advocacy out of the SBA to ensure complete independence.

It is critical that agencies seek input from small businesses early in the rulemaking process. This is a common sense concept that is supported on both sides of the aisle in various legislative proposals.

State Efforts and What's Working

Most elected officials at the state and local level understand that in order to attract investment and encourage new business creation, policies must be conducive to economic growth. A business-friendly policy environment has become a critical state asset for attracting businesses, investment and fostering entrepreneurship. Over the years, we have seen many states implement reforms that require regulators to consider small business impact, and consider the costs of proposed regulations.

Like Australia, states in the U.S. have developed intensive processes for reviewing regulations on the books, placing a "time-out" on new regulations, and requiring that regulators complete cost-benefit, business and competitiveness impact statements. In most of these reform-minded states, these processes are transparent, online and open to the public for input. A collaborative effort between the governor and legislature in Michigan, for example, has led to the elimination of 1,950 rules and regulations.

The Mercatus Center looked at state regulatory reform efforts ("State Regulatory Review: A 50 State Analysis of Effectiveness," June 2012) and prioritized the effectiveness of reform initiatives. The report noted: "Overall our results have clear implications for policies targeting regulatory reform. The findings suggest that several procedural safeguards lead to a reduction in both regulatory creation and enforcement. The single most important policy in a state is the presence of a sunset provision. Requiring new regulations to be studied for their impact on government expenditures and revenues (government cost-benefit analysis) and requiring the presentation of alternative, lower-cost policies to achieve the same regulatory goals may also improve state regulatory systems. Finally, the review process should be housed in either the legislature or an independent agency to be most effective."

The legislature plays a key role in successful efforts at the state level and in other countries for identifying and taking action on regulations that need to be repealed or modified. This clear trend and "best practice" is why SBE Council supports greater involvement by the Congress when it comes to reforming or intervening on federal rulemakings.

2. **Suppose I owned a small business, say an automotive dealership; what federal regulations would I have to be concerned about and how would this affect my business – would these compliance costs be a few hundred dollars as someone at the hearing suggested? How would these regulations influence my ability to hire and keep new employees? What are some other hidden costs and unknowns that must be considered?**

As I noted in my written testimony, small businesses are disproportionately impacted by government regulation. Some are more impacted than others in terms of per-employee cost depending upon industry, size of workforce and other factors, such as specific obligations to comply with environmental rules.

The cost range can be sizable from a couple of thousand dollars per-employee to the tens of thousands with the average being $11,724 per-employee (for firms with under 50 employees), according to a 2014 study by the National Association of Manufacturers. The auto dealers have conducted their own study on the cost of regulation for their sector. According to the National Automobile Dealers Association (NADA), dealers must comply with 85 federal regulations. In a May 2014 report that measured the impact of 61 of these federal regulations, NADA reported that the average car dealership spent $182,754 on compliance costs, which amounted to $2,400 per-employee on average. The average car dealership had to sell 106 vehicles in 2012 to recoup these costs. The report also noted that there were 10,550 fewer dealership jobs as a result of the regulatory costs.

The NAM and NADA studies measure different things, so they are not an apples-to-apples comparison of regulatory costs. Still, these studies demonstrate that regulations impact business operations, competitiveness, and job creation. Higher regulatory costs means there is less capital available to put back into the business for new jobs, better benefits, and growth opportunities. With many regulatory proposals, there is both a direct and indirect impact on small businesses. The impact can be higher costs for small businesses (for example: energy, health coverage, capital) and less choice in the marketplace for consumers, including small business consumers. When small businesses are forced to raise prices to cover regulatory costs, this puts these firms at a competitive disadvantage to larger firms. Sound federal rulemaking would take into account these costs and consequences, and take seriously the views of stakeholders when they alert regulators to the potential negative outcome of regulatory proposals.

Committee on Science, Space & Technology
"Midnight Regulations: Examining Executive Branch Overreach"
February 10, 2016

Questions for the Record to:
Ms. Karen Kerrigan, President and CEO, Small Business & Entrepreneurship Council
Submitted by Congressman Eric Swalwell

1. I asked you at the hearing about your relationship with and work on behalf of Phillip Morris. These facts are particularly relevant to understanding your perspective at a hearing on government regulation, considering the tobacco industry's historic and long fight against such federal oversight.

   Specifically, in response to my questions you denied that you were a member of the Federal Legislative Team for Philip Morris and said you would be surprised to learn that your name appeared on a Philip Morris document, labeled "Good Science Project Plan" and dated October 1997, listing you and three others as part of the Federal Legislative Team. In what appears to be an updated version of the same document, titled "Sound Science Project Plan" and dated December 1997, you seem to be listed as having secondary responsibility for drafting appropriations language for Philip Morris and introducing the draft to an appropriations committee.

   Several other publically available documents, some of which we have attached and provided links to below for your review, indicate that you in fact had a very close working relationship with the tobacco industry. In one document, which appears to be current as of October 19, 1999, you and the Small Business Survival Committee are listed as "National Allies" in a "Federal Lawsuit Roll-Out" database. In an internal Philip Morris memo dated January 11, 1998, you are described as a potential witness based on the work done "on the OSHA issue." In an e-mail written on October 3, 1995, you are described as a proxy for Tim Hyde, former Senior Director of Public Issues at RJ Reynolds Tobacco company (RJR), who appears to have been booked as a guest for a radio show. Finally, in internal RJR emails from September of 1995 which are now publically available, tobacco executives wrote:

   > "So, despite some initial balking by PM (Josh Slavitt was their rep.) we agreed to also move ahead with the Aug. 21 idea – a quick analysis of economic impact of FDA, primarily on job loss. Economist Charles de Seve of American Economics Group in Washington will do the study and have it completed in 7-10 days. Karen Kerrigan of the Small Business Survival Committee (which Tim and Mike provided) has agreed to commission the study and take ownership. de Seve will contact the Barents crowd (which will do the more detailed study) and collaborate on information. I'll work with Kerrigan, Tim & Mike on a plan to communicate the results of the study. PM agreed to split the cost of this study. Our share will be $3,500" (emphasis added).

Subsequent to this email, a study with the American Economics Group was indeed commissioned by the SBSC, and the SBSC did extensive outreach. Also attached is an October 2, 1995 memo between RJR tobacco executives outlining a plan for you and SBSC to publicize the study in question.

As I mentioned above, at the hearing you denied an affiliation with Philip Morris as part of the Federal Legislative Team for the "Good Science Project Plan," and you also expressed surprise at being listed as a member of said team.

a. After reviewing the attached documents, are these still your positions? If so, how do you explain your name being on these documents? If not, please indicate the duties you recall carrying out in your role as part of the Federal Legislative Team. What was your relationship to John Hoel and Theresa Gorman, who are also listed as members of the team? Do you recall consulting with either of them on work that was part of the "Good Science Project Plan" or "Sound Science Project Plan"?

When asked by Mr. Swalwell at the committee hearing on February 10 if Philip Morris was a past contributor to the Small Business Survival Committee, I responded "yes." When asked by Mr. Swalwell at the hearing if I was would be surprised to learn that I was listed as a member of the Federal Legislative Team at Philip Morris on the project he identified, I responded "yes," that I was indeed surprised to learn that information. I do not know why I am listed as a member of the Federal Legislative Team on the planning documents for this project. I was never a member of the Philip Morris staff, or a consultant, or a paid lobbyist. With respect to the question regarding John Hoel and Theresa Gorman, I recall several discussions about regulatory reform issues.

b. In general, how would you describe the relationship that existed between Philip Morris, RJR, the Small Business Survival Committee (SBSC), and yourself?

The companies were corporate supporters of SBSC. We discussed issues of mutual interest and concern just like members of Congress do with their corporate contributors. The companies supported our small business educational initiatives. As we did with a broad range of companies and people in the business community, SBSC worked with Philip Morris and RJR on coalitions, special events, and policy-related activities.

c. In the past fifteen years, have you or your organization been compensated by any tobacco company or organization?

I have never been personally compensated by any tobacco company. As noted above, the organization had received support from Philip Morris and RJR.

d. Do you or your current organization still have a relationship of any sort with Philip Morris or any other tobacco company? If so, please describe that relationship and when it began.

No, the organization does not currently receive support from Philip Morris or any other tobacco company. As noted above, I have never been personally compensated by tobacco companies.

c. When did your relationship with Philip Morris or these other companies begin? When did such relationships end?

The organization received support beginning in 1995, and received contributions on and off throughout the years with the last one in 2010.

2. A documented entitled "Small Business and The Economy" from August 1998 (attached and links provided below) shows that Chris Horner, currently a senior fellow with the Competitive Enterprise Institute, and the Energy & Environment Legal Institute, worked for the SBSC at the same you served as its president.

a. What role did Mr. Horner serve while he was employed at the SBSC?

Mr. Horner was a consultant working on a range of regulatory and Small Business Regulatory Enforcement Fairness Act (SBREFA) issues.

b. What was his role with work done for the tobacco industry, or, individual tobacco companies while he worked at the SBSC?

None.

c. How would you characterize your current relationship with Mr. Horner?

We are Facebook friends.

Attachments

Sound Science Project Plan - https://idl.ucsf.edu/tobacco/docs/#id=zqng0155

Federal Lawsuit Roll-Out "National Allies" - https://idl.ucsf.edu/tobacco/docs/#id=jkyh0172

Internal PM memo from January 1998 - https://idl.ucsf.edu/tobacco/docs/#id=slmv0013

E-mail from October 3, 1995 - https://idl.ucsf.edu/tobacco/docs/#id=hlfx0122

Internal RJR email from September 1995 - https://idl.ucsf.edu/tobacco/docs/#id=snmp0187

October 2, 1995 memo - https://idl.ucsf.edu/tobacco/docs/#id=rpyp0000

Small Business and The Economy, August 1998 - https://idl.ucsf.edu/tobacco/docs/#id=pmpc0069

Project Team

- Tom Borelli - Project Leader
- David Cooper - General Team Member
- Federal Legislative Team
  - Jim Tozzi, Consultant
  - John Hoel, _____(Title), WRA DC
  - Theresa Gorman, _____,
  - Karen Kerrigan, _____,
- State Legislative Team
  - Mark Berlind, _____, WRA
  - Todd Gimble, ~~Consultant~~
  - _____ Showalter, _____,
  - _____ Boltz
  - ~~_____ Becker, _____, _____~~
- Research Team

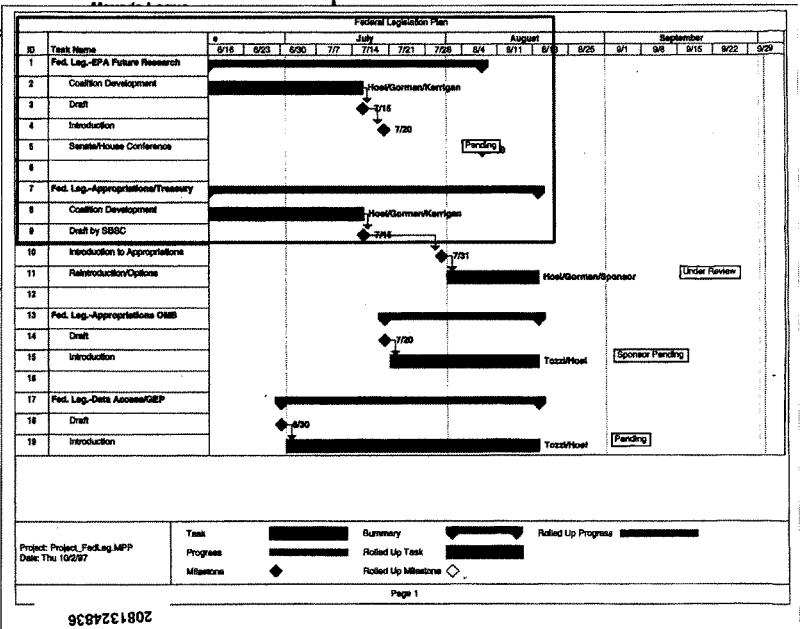
Sound Science

Good Science

Project Plan

October XX 1997

2081324818



2081324836

Source: http://industrydocuments.library.ucsf.edu/tobacco/docs/gqhv0178

PHILIP MORRIS MANAGEMENT CORP. INTER-OFFICE CORRESPONDENCE
1341 G STREET, N.W., SUITE 900, WASHINGTON, DC 20005

To: David Nicoli **Date:** January 11, 1998

From: John Hoel

Subject: Strategic Plan for Senate Environment and Public Works Committee Hearings

cc: Steve Parrish
Howard Liebengood
Ellis Woodward
Mark Berlind

At this time, we are aware of at least two hearings in the Senate Environment and Public Works Committee on the ETS provisions of the Proposed Resolution. The first is a January 21st field hearing in Rhode Island.

Our general goal for the hearings and markup should be to end up with restrictions on smoking in public buildings which are similar to our draft bill. This will be a challenge, as all three Senate bills differ in some significant way from the PR. Specifically, the McCain, Kennedy and Hatch bills extend the prohibition on smoking outdoors to the vicinity of the building entrance. This would be further harassment for our customers. Pushing these people out from under the vestibule and into the elements could virtually eliminate smoking in the workplace, unless the employers installs the required ventilation systems. President Clinton included an "in the vicinity" restriction in his draft Executive Order, but due to opposition removed the language in the final EO.

I. Congressional Hearings:

Chris Hessler, Chafee's committee staffer responsible for the hearings, told us the January 21st hearing will consist of two panels. In order to educate the members of the committee, the first panel will explore the history of the federal government's regulation of smoking. There will be government witnesses, but we have no indication of who will testify. Chris did not appear to want Carol Browner.

The second panel will investigate smoking restriction options and affected industries. Chris specifically mentioned small and chain restaurants, bars, public health, building managers and possibly the tobacco industry. We know Chris does not give much credence to EPA cancer risk assessment and he does not want the hearing to turn into a debate about the science.

Chris Hessler has been reticent to share information about witnesses, so we may be very limited in what we can do. As with OSHA's IAQ hearings, our allies are our most important asset. Educating and mobilizing them must be a top priority.

We can have a much greater impact on the second panel.

Action items for second panel:

- I've called Rick Berman, counsel to **American Beverage Institute**, which represents chain restaurants, and asked him to identify members to testify. I specifically requested restaurants which are headquartered in:
  - Rhode Island (Chafee),
  - Florida (Graham) (Outback Steak House is headquartered in Florida and the CEO is close to Graham),
  - New Jersey (Lautenberg)--we'll also use the casinos with him,
  - Missouri (Bond) (Houlihan's), and
  - Colorado (Allard) (VICORP restaurants--Village Inns and Bakers Square--which have no bar area and 35% of their customer base smoke.)
- Deb Leach, Executive Director of the **NLBA**, has identified bar owners in Montana (Baucus), Idaho (Kempthorne), Wyoming (Thomas) & Oklahoma (Inhofe) to testify and meet personally with the Senators.
- Lanny Griffith and I are scheduled to meet with Bill Sitman, Executive Director of the **American Gaming Association**, to discuss strategy, particularly with regard to Harry Reid and Lautenberg. I also hope to work with the major casinos and their respective state associations as well.
- I spoke with Elaine Graham, the Senior Vice President for Government Affairs of the **National Restaurant Association**, to see whether they will be helpful and possibly submit testimony. RJR is on the Board of the NRA and will take the lead. The issue of NRA's position on the PR will be on the agenda for the January 18th Board of Directors meeting.
- Call the **International Society of State Restaurant Association Executives** to see if state association Presidents from states represented on the committee could submit testimony.
- I tasked Eric Ostern with PMUSA to schedule a meeting for me with the VP for Government Affairs at the **American Hotel & Motel Association**.
- **Hotel and Restaurant Employees** and **BCT**. I've spoken with Jarvis and Mike Tinor. We should prepare testimony and see if the committee will invite them or at least allow them to submit written testimony. (See California HRE suit on smoking ban)
- I will call Karen Kerrigan with the **Small Business Survival Committee** and ask whether she would consider testifying. She has done some very good work, having several letters to the editor published on the OSHA issue.
- Draft written testimony. All of the aforementioned groups should have written testimony prepared for the January 21st hearing, whether the testify or submit it for the record. I have retrieved the OSHA IAQ hearing

Sound Science

Project Plan

December 1997

2078839087

Source: http://industrydocuments.library.ucsf.edu/tobacco/docs/zqng0155

2078839087

2078839087

2078839105

Tasks With Accountabilities

Federal Legislative Strategies

Tasks	Duration (days)	Primary Responsibility	Secondary Responsibility
Fed. Leg.-EPA Future Research	81		
Senate/House Conference	81	Hoel	Gorman/Logue
Fed. Leg.-Appropriations/Treasury	61		
Draft by SBSC	0	Hoel	Gorman/Kerrigan
Introduction to Appropriations	0	Hoel	Gorman/Kerrigan
Reintroduction/Options	48	Hoel	Gorman/Sponsor
Fed. Leg.-Appropriations OMB	63		
Draft	0	Hoel	Tozzi
Introduction	62	Hoel	Tozzi
Fed. Leg.-Data Access/GEP	78		
Draft	0	Hoel	Tozzi
Introduction	77	Hoel	Tozzi
Data Access Policies	119		
Gov't Agencies	119	Seeman	Woodell
Journals	99	Seeman	Woodell
Scientific Associations	99	Seeman	Woodell
Develop Media Opps. & Coalition	99	Borelli	Team
Project Team Meetings	0	Borelli	Team

2078839105

2078839105

Source: http://industrydocuments.library.ucsf.edu/tobacco/docs/zqng0155

Oct. 2, 1995

TO: Rob Meyne

FROM: Mark Smith

RE: **FDA ECONOMIC ANALYSIS**

Attached for review and consideration is a draft of the FDA study by economist Dr. Charles de Seve of the American Economics Group for the ***Small Business Survival Coalition.***

> Also attached for consideration is an outreach plan by Karen Kerrigan of the ***Small Business Survival Coalition.*** This work by the Coalition would be an effort to get the study out to the media, lawmakers and others.

Key Findings of the Study:

A tobacco ad ban and promotional ban would not just affect the tobacco industry -- it would take money from thousands of large, medium and small companies and their workers across the United States.

Some 91,568 people are directly employed in jobs that are at risk from the FDA action: jobs with newspapers and magazines, clothing makers, sporting goods, retail sales jobs, advertising, transportation, warehousing and distribution and print shops to name some.

Of these jobs *at least 50,000 full and part-time jobs would be lost* with these bans.

Some 154,139 other less obvious jobs are at risk, ranging from real estate agents to fabricated metal machine operators to clerical office workers -- and come from the spending of people holding jobs directly at risk when they purchase goods and services.

Of these jobs *at least 75,000 would be lost* with these bans.

Getting the Word Out -- RJR Outreach:

Once the Small Business Survival Coalition sends out its news release and copies of the study, we are free to begin getting the word out. Here are a few suggestions: As with the federal cigarette tax fight, we would 1) place copies of the study and talking points with every RJR trading partner -- NACS, wholesalers, etc. working with Gary Loser; 2) communicate with employees and retirees; 3) incorporate study findings into every Op-Ed and L-T-E we produce -- as added evidence of the devastation these bans and FDA jurisdiction would have on this industry; 4) work with every smokers' rights group around the country, incorporating into talking points for radio, L-T-Es and Op-Eds, letters to legislators, etc.

mds:

Attachments: 1) Study; 2) Small Business Survival Coalition Reach Out Effort Proposal

51751 7235

Source: http://industrydocuments.library.ucsf.edu/tobacco/docs/rpyp0000

NATIONAL ALLIES

Organization/Web	Contacts/E-Mail	Mailing Address/Phone
Republican National Hispanic Assembly of the U.S. www.rnha.org.	Jose Rivera rnhai@aol.com	600 Penn. Ave, SE, Suite 300 WDC 20003 T: 202-544-6700 F: 202-544-6869
Reynolds Metal Company	Steve Walker stwalker@rmc.com	1101 Vermont Ave., NW, Suite 403 WDC 20005 T: 202-898-1654 F: 202-898-0693
Small Business Survival Committee www.sbsc.org	Karen Kerrigan rstikes@sbsc.org	1320 18th Street, NW, Suite 200 WDC 20036 T: 202-785-0238 F: 202-822-8118
Small Business United of Texas	David Pinkus sbutx@usa.net	1011 West 11th Street Austin, TX 78703 T: 512-476-1707 F: 512-477-9697
Tax Foundation tf@taxfoundation.org www.taxfoundation.org	J. D. Foster jdfoster@taxfoundation.org	1250 H Street, NW, Suite 750 WDC 20005 T: 202-783-2760 F: 202-783-6868
United Food & Commercial Workers International Union	Patricia Scarcelli pscarcelli@uscw.org	1775 K Street, NW WDC 20006 T: 202-223-3111 F: 202-466-1562

2073947889

2073947889

Source: http://industrydocuments.library.ucsf.edu/tobacco/docs/jkyh0172

PHILIP MORRIS COMPANIES INC.
WASHINGTON RELATIONS OFFICE
1341 G Street, NW, Suite 900
Washington, DC 20005
Main: 202/637-1500 Fax: 202/637-1505

CONFIDENTIAL

***** Please Deliver Immediately *****

Updated 10/19/99

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TO:

Allen, Carla	202/463-6199
Berthoud, John	703/683-5722
Boaz, David	202/842-3490
Booker, Sid	215/887-6272
Brightup, Craig	202/546-9289
Burke, Kevin	703/538-4673
Cohen, Jackie	202/467-0559
Cornelious, Melvin	412/521-0171
Cuarillo, Carlos	212/598-9414
Dodge, Sarah	703/351-9160
Eusebio, Nelson	718/747-2859
Foster, J.D.	202/783-6868
French, David	703/538-4673
Gallegos, Gilbert G.	202/547-8190
Garcia de Posada, Roberto	
Gilligan, Dan	703/351-9160
Houston, Thomas	214/871-3020
Johnson, D. Lynn	703/524-7707
Josten, Bruce	202/887-3403
Katz, Marc	703/836-4564
Kelly, Ty	202/429-4549
Kerrigan, Karen	202/822-8118
Kim, David	213/388-2489
Kimball, Amy	202/842-3275
Massee, Ned	212/318-5050
McBurney, Shawn	202/467-5300
McDaniel, Janice	917/663-5315
Mone, Lawrence	212/599-3494
Olsen, Mary	703/437-7768
Paige, Ralph	404/765-9178
Pinkus, David	512/477-9697
Reed, Lawrence	517/631-0964
Ridenour, Amy	202/408-7773
Rivera, Jose	202/544-6869
Samuels, Ralph	907/272-4117
Scarcelli, Patricia	202/466-1562
Scofes, Stephen	517/485-2550
Soto, Steven	323/227-6935
Strachan, David	202/467-0559
Strange, Roy	501/491-5322
Vagley, Robert	202/293-1219
Valis, Wayne	202/393-0120
Villarreal, Massey	202/842-3221
Walker, Steve	202/898-0693
Wallop, Malcolm	703/527-8388
Wenning, Tom	703/437-7768
Weyrich, Paul	202/547-0392
Withey, Lyn	202/628-1368

2073947891

FROM:

PAGES TO FOLLOW:

Source: http://industrydocuments.library.ucsf.edu/tobacco/docs/jkyh0172

Woodward, pundits from across the political spectrum were unanimous in the view that Nicoli had soundly thrashed Woodward--or "Kitty" as the pundits now refer to him--in this heated exchange.

Many saw this as a turning point in the battle between the two titans, and speculation was running rampant that Woodward would follow his political idols Pete Wilson and Craig Fuller to the exits shortly.

(Optional)
Said Nicoli on Woodward's possible exit: "We have an old saying where I come from--you've gotta lift your leg just a little bit higher to piss with the big dogs."

2047029067

From: Woodward, Ellis on Mon, Oct 2, 1995 5:41 PM
Subject: RE: Helms Bill
To: Nicoli, David

Remember, cats, regardless of party affiliation, have nine lives. When I think of cats, I'm not thinking of domestic ones waiting around for their next meal. I'm thinking of lions, panthers and tigers. Have you ever seen a pissed off tiger? I'm just beginning to work on the used kitty litter plan for your front lawn and love the thought of you slipping and sliding your way to the front door....or maybe your room on the USS Philip Morris. A final thought, bud. If I'm the cat, you're the canary. Lionheart

2047029067 A

From: Nicoli, David on Mon, Oct 2, 1995 3:48 PM
Subject: RE: Helms Bill
To: Woodward, Ellis

MEOOOWW!!!

Kitty doesn't like Monday, does she--so touchy.

Anyway, omce I told Helms office you were inquiring, they said they will not tell me. (something about your party affiliation---hmmm.)

I'll try w/other sources and leave your name out this time.

2047029067 B

From: Woodward, Ellis on Mon, Oct 2, 1995 1:26 PM
Subject: Helms Bill
To: Nicoli, David

2047029067 C

Getting ready to circulate the Helms bill. Assume it has been referred to Commerce Committee. Pls advise. As always, it is a pleasure doing your job for you.

Note for Woodward, Ellis

From: Woodward, Ellis

2047029067 D

Date: Tue, Oct 3, 1995 2:44 PM

Subject: FW: FDA Project Summary

To: Firestone, Marc

FYI

From: Walls, Tina on Tue, Oct 3, 1995 8:48 AM
Subject: FDA Project Summary
To: Beauchemin, Ed; Crawford, Derek; Dillard, Jack; Fisher, Scott; Flowers, Sheila; Inmann, Pam; Lemperes, Jim; Lenzi, Jack; Paluszek, Matt; Pontarelli, Jim; Poole, Jay; Portnoy, Sharon; Scott,

2047029067 E

Tracey; Turner, Henry
Cc: Bell, Linda; Laurianti, Linda; Molitor, Pamela; Navarro, Manuel; Parr, Sandi; Reed, Julie; Smith, Mary Anne; Vaccaro, Nancy; Weycker, Aleece; Woodward, Ellis

I am forwarding the last memo via fax today which I promised re: the state by state fda project. that means you should have 3 documents which provide you with draft letters, a list of the types of individuals and groups who should file, and instructions for filing.

as we discussed yesterday, the objective is to submit at least 10 quality letters per state primarily from elected officials and also from key trade and business associations. you know your state assignments.

fda filing deadline is now 12/9 but please make sure letters are filed as soon as possible. also please provide a copy of the letter to derek and dan wahby. we will of course circulate these letters internally.

USE YOUR WEEKLY REPORT TO HIGHLIGHT PROGRESS ON THIS PROJECT AND THE AAA PROGRAM. THAT WAY WE CAN SHOW THE PROGRESS THAT HAS BEEN MADE IN YOUR STATES AND INSIST THAT DAN WAHBY PROVIDE A WEEKLY REPORT ON ALL STATE ACTIVITY.

Let me know if you have any questions. Thanks

2047029068

Note for Woodward, Ellis

From: Woodward, Ellis
Date: Tue, Oct 3, 1995 2:43 PM
Subject: RE: Wallop Radio Show
To: Marden, Roy

That's the one.

2047029068A

From: Marden, Roy on Tue, Oct 3, 1995 2:38 PM
Subject: RE: Wallop Radio Show
To: Woodward, Ellis

2047029068B

There's so many of these summary-type documents around I'm not sure which is which. But I assume it's the 10-page C&B FDA summary document you distributed about a month ago?

From: Woodward, Ellis on Tue, Oct 3, 1995 2:34 PM
Subject: RE: Wallop Radio Show
To: Marden, Roy

2047029068C

We should send them Reame's analysis of the regs. It's concise and useful. Thanks.

From: Marden, Roy on Tue, Oct 3, 1995 2:08 PM
Subject: RE: Wallop Radio Show
To: Woodward, Ellis
Cc: Collamore, Thomas

2047029068D

I spoke with Wallop's staff today to confirm Steve's appearance, Tue, Oct 10, 11pm-midnite. Other guests will include Tim Hyde from RJR (or his proxy, Karen Kerrigan, president of the Small Business Survival Committee), and possibly someone from B &W.

Armstrong Williams' research staff is preparing info for Wallop as we speak, although it likely won't take much as he seems to be up to speed on much of this. However, whatever documentation

Source: http://tobaccodocuments.library.ucsf.edu/tobacco/docs/hlfx0122

Small Business and The Economy

"Surviving Entrepreneurship in the 1990's"

Issue #18 | Visit SBSC's Website at http://www.sbsc.org | August 1998

PRESIDENT'S MESSAGE

Challenging the EPA

by Karen Kerrigan

With a federal judge throwing out the Environmental Protection Agency's (EPA's) claimed "science" on secondhand smoke, Administrator Carol Browner has given the courts, taxpayers, and the regulated community even more cause for heightened scrutiny. On July 17, U.S. District Judge William Osteen rendered a scathing opinion of the agency's processes and activities.

In case you missed Judge Osteen's opinion : "EPA publicly committed to a conclusion before research had begun...adjusted scientific procedure and scientific norms to validate the Agency's public conclusions, and aggressively utilized authority to disseminate findings to establish a *de facto* regulatory scheme intended to restrict Plaintiff's products and to influence public opinion."

Of course, thousands of small businesses and restaurants have already been impacted by the EPA's policy decisions. Smoking is banned in all California eateries, and other governments are considering similar bans due to EPA's fear mongering. But this issue goes way beyond the controversy over second-hand smoke. In fact, SBSC is suing the EPA for behavior similar to those exposed by Judge Osteen.

SBSC's suit focuses on the EPA's defiance of the Small Business Regulatory Enforcement Fairness Act in issuing stringent new rules on particulate matter (pm) and ozone under the Clean Air Act. The EPA fallaciously states that they do not have to comply (requiring them to determine a regulation's impact on small businesses and developing alternatives if that impact is severe) because it is the states who will be doing the implementing.

When issuing these rules, the EPA claimed that 40,000 people were dying each year due to dangerous levels of soot and smog. After being challenged, they lowered that figure to 20,000, then 10,000. Of course, the taxpayer-funded data used to justify their rule was never released to the public or scientific community for review.

The bottom line is that Carol Browner, in advancing a politically-driven agenda in the manner described by Judge Osteen, is abusing her office by twisting the rules and the facts to achieve what she likely could not under real standards of science and honesty.

Coming in September: **SBSC's Ratings of Congress**
Is your member a friend or foe of small business?

SBSC Keeps Pushing for Tax Cuts

SBSC is pushing Congress hard to cut taxes deeply and across the board. Our efforts were recognized recently in a letter from Senator John Ashcroft to SBSC President Karen Kerrigan. The Senator wrote:

> "Before you and I expressed our dissatisfaction with the proposed budget, the Senate was on the verge of passing a budget resolution woefully short on tax relief and long on federal spending. Because of our efforts, the Senate leadership has agreed to pursue substantially more tax relief—possibly multiples of the tax cut previously advanced in the Senate."

On June 17, SBSC took part in a Capitol Hill press conference urging Congress "to give back to individuals, families and small business owners more of their hard-earned dollars." Kerrigan declared: "Small businesses and entrepreneurs and their workers are largely responsible for



SBSC President Karen Kerrigan and Steve Forbes joined forces to push for unrestricted, tax-free Medical Savings Accounts for all Americans at a Press Club press conference on July 9.

current economic gains and the record level of revenues pouring into the U.S. Treasury, yet they somehow feel left out of the

• continued on page 2 •

INSIDE THIS ISSUE:

- Page 2: Telecommunications & Small Business
- Page 3: SBSC News & Other Highlights
- Page 4: SBSC vs. the Global Warming Treaty
- Page 5: SBSC Issues in a Minute
- Page 6: The Small Business Survival Index

A publication of the **Small Business Survival Committee**
1320 18th Street, N.W. • Suite 200 • Washington, D.C. • 20036 • Tel: (202)785-0238 • Fax: (202)822-8118
Karen Kerrigan, President • Raymond J. Keating, Chief Economist
Capitol Hill Switchboard: 202-224-3121

2081323077

Source: http://industrydocuments.library.ucsf.edu/tobacco/docs/pmpc0069

BUSINESS NEWSMAKER & HIGHLIGHTS

NEW FEATURES

• SBSC's two new additions to its website at www.sbsc.org:

1) "The Entrepreneurial View" is a new weekly CyberColumn by SBSC chief economist Raymond J. Keating. Initial columns include: "Budget Surpluses, Slowing Economy Require Tax Cuts" (July 29), "'No Thanks' to European Regulation" (July 22), and "Hot and Bothered Over Global Warming" (July 15).

2) The "Small Business Fact of the Week" provides interesting and informative bits of information about the entrepreneurial sector of our economy and public policies affecting it.

CONGRESSIONAL TESTIMONY

• On July 22, Jon Hokenyos of TXP Consulting testified before the House Subcommittee on Regulatory Reform and Paperwork Reduction on the impact of current energy deregulation proposals on small business.

• On June 11, SBSC Counsel Christopher Horner testified before the House Committee on Small Business regarding the Kyoto Protocol to the United Nations Framework Convention on Climate Change, or the Global Warming Treaty.

• On June 4, Keating testified before the House Small Business Committee on the small business costs of the Kyoto Protocol.

• On April 28, SBSC's Horner provided testimony to the Senate Committee on Small Business at a hearing on environmental compliance tools for small business.

• On April 23, Horner testified before the House Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs regarding the Global Warming Treaty.

BUDGET and TAXES

• SBSC President Karen Kerrigan wrote a piece for "The Hill" newspaper on June 18 regarding key tax changes important for small business.

• The Small Business Survival Foundation's third annual Small Business Survival Index was published on July 9, and already has received media coverage from Honolulu to Buffalo, NY, including in the *New York Post*, *Honolulu Star-Bulletin*, the *Houston Chronicle*, *The Washington Times*, *Detroit Free Press*, *Atlanta Business Chronicle*, Alabama *Huntsville Times*, *Phoenix Business Journal*, *Finance and Commerce*, *Your Company* magazine, Gannett Newspapers and the *Buffalo News*. Radio coverage has included *Radio America* and stations in California, Colorado, Ohio, and New York.

• Keating wrote an article ("Heaven and Hell for Entrepreneurs") for the July 17 *Investor's Business Daily* on the Small Business Survival Index.

• Kerrigan was interviewed on June 19 for a *Los Angeles Times* article on tax overhaul and small business.

• On May 27, Keating wrote an article for *The Washington Times* entitled "Capital Gains Kill."

• The July 13 *Washington Times* ran an article by Keating which examined developments in New York City's budget.

• On March 31, *Bridge News* ran an article by Keating entitled "US Enjoying the Bounty of a Low Capital Gains Tax."

• Among Keating's recent *Newsday* columns (co-authored with *National Review's* Matthew Carolan) were "Flat Tax Should Replace the Income Tax," "State Budget Is a Profile in No Courage," and "Don't Fight Village Hall, Get Rid of It."

REGULATION

• On June 26, Kerrigan joined Americans for Tax Reform in recognizing Cost of Government Day, with quotes picked up by Bloomberg TV, Fox News, and many print & radio outlets.

• Keating analyzed the Clinton Administration's faulty cost analysis of the Global Warming Treaty in a July 10 *Bridge News* article ("The Clinton Administration's Magic Act").

• SBSC's May 1998 FOIA request for the Council of Economic Advisors' economic analysis of Kyoto received wide media pick-up.



SBSC President Karen Kerrigan debated Joan Claybrook and another Consumer Federation of America panelist on the pros and cons of Senator Fred Thompson's Regulatory Improvement Act.

• SBSC's Regulatory Counsel Chris Horner participated in a series of global warming press briefings in North Carolina on May 12 & 13. He was a guest on local television and radio news shows, and met with the *Triangle Business Journal*.

• On April 30, Kerrigan appeared with Senator John Ashcroft to announce SBSC's support for his "no implementation without representation" legislation on the Kyoto Protocol.

• In a *Bridge News* article for April 24 ("America's Neo-

continued on page 4

Source: http://industrydocuments.library.ucsf.edu/tobacco/docs/pmpc0069

From: Griscom, Tom C.
To: Smith, Mark D.
CC:
BCC:
Subject: Econ.Impact FDA{F}
Primary Date: 9/14/1995 3:54:00 PM
Last Modified Date: 2001-Nov-20 10:42:22
Last Touched Date:
Sent Date: 1995-Sep-14 15:40:00
Received DateDate: 1995-Sep-14 15:54:00

Attachments:

good move.

tg

From: Smith, Mark D.
To: Meyne, Rob W.; Griscom, Tom C.
Cc: Hyde, Timothy N.; Phillips, Mike W.
Subject: FW: Econ.Impact FDA
Date: Wednesday, September 13, 1995 10:32AM

UPDATE 9/13/95

We are finally moving ahead with the economic analysis study of the FDA -- on two fronts. I met yesterday in Washington at TI with PM, Bill Orzechowski and lawyer David Remes of Covington & Burling.

Remes' biggest concern is that he needs extensive, documented major economic study by well-recognized big accounting firm to submit into the official FDA record as testimony. Rudy Penner and Linden Smith of Barents Group (KPMG) were at first part of meeting to get scope of study requested (and it appears they will conduct this major study, after presenting a final proposal shortly). Remes said that the industry executive committee has already approved funding for this. Study will take several weeks to complete, but parties are optimistic they can meet FDA deadline (Nov. 9?).

My biggest concern is that we need information immediately to use in Op-eds, Letters to editors and legislators, talking points, etc. as outlined in the Aug. 21 memo below. My other concern is that if the big study needs to be

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Source: http://industrydocuments.library.ucsf.edu/tobacco/docs/snmp0187

reviewed by all the legal folks and PM, it may will take even longer than anticipated.

So, despite some initial balking by PM (Josh Slavitt was their rep.) we agreed to also move ahead with the Aug. 21 idea -- a quick analysis of economic impact of FDA, primarily on job loss. Economist Charles de Seve of American Economics Group in Washington will do the study and have it completed in 7-10 days. Karen Kerrigan of the Small Business Survival Committee (which Tim and Mike provided) has agreed to commission the study and take ownership. de Seve will contact the Barents crowd (which will do the more detailed study) and collaborate on information. I'll work with Kerrigan, Tim & Mike on a plan to communicate the results of the study. PM agreed to split the cost of this study. Our share will be $3,500.

From: Griscom, Tom C.
To: Meyne, Rob W.; Smith, Mark D.
Subject: RE: Econ.Impact FDA
Date: Monday, August 21, 1995 4:02PM

i concur on this; rob, if you agree, let's move ahead.

tg

From: Smith, Mark D.
To: Meyne, Rob W.; Griscom, Tom C.
Subject: Econ.Impact FDA
Date: Monday, August 21, 1995 3:08PM

Rob/Tom:

Question for your consideration: May we proceed on developing "economic impact" and specifically, a "job loss" statement on proposed FDA regulation?

Here is a quick analysis of potential job loss numbers based on the following statistics provided by the FTC, as reported by the Wall Street Journal this morning:

Coupons, multipack cig and free key chains, etc. $2,559.2 Million

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70053 7918
Source: http://industrydocuments.library.ucsf.edu/tobacco/docs/snmp0187

Promotion allowances 1,557.5
Speciality items distribution, giveaways 755.8
In-store point of sale ads 400.9
Magazine ads 235.2
Outdoor ads 231.5
Public entertainment (sponsorships) 84.3
Sampling 40.2
Transit ads 39.1
Newspaper ads 36.2
Direct mail 31.5
Miscellaneous 63.7

Total $6,035.1 Million

To get a quick handle on the economic impact, TI's Bill Orzechowski and I quickly put together the following jobs-loss calculation:

For the sake of argument, we might drop the entire first category, "coupons, multipack cig and free key chains, etc." -- since that money might simply return to the manufacturers (and perhaps spent or absorbed elsewhere, the thinking goes). Drop this category and we are left with about $3.5 Billion in spending that will be curtailed.

Economists generally figure 75% to 80% of spending goes toward wages and salary. Thus 75% of $3.5 Billion is $2.625 Billion.

The average national median wage is roughly $25,000. (Some might argue that many of these jobs may be low-paying ones in which workers simply "stuff" promotional items. Actually, it would probably be appropriate to balance those jobs off with the more skilled jobs employed by advertising agencies, so the $25,000 average wage might be fairly accurate.)

Thus the $2.625 Billion spending by tobacco on all these forms of promotion which the FDA and President Clinton want to ban account for roughly 105,000 jobs. This quick analysis finds that President Clinton's and the FDA's proposed regulation of tobacco would mean the immediate loss of 105,000 jobs -- not counting those jobs lost to couponing and some promotional giveaways.

QUESTION...

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RJR0000000507132856
70053 7919
Source: http://industrydocuments.library.ucsf.edu/tobacco/docs/snmp0187

Given that there appears to be a significant job-loss potential from Clinton-style FDA regulation of tobacco, should we -- via the TI and Bill Orzechowski -- have a reputable, credible economist or accounting firm do a white paper on this?

The job-loss figures we had handy throughout the entire Federal Excise Tax exercise proved valuable. If we had such figures available for the FDA issue, we could begin incorporating them in our own responses as well as for outreach efforts via Talking Points, Op-Eds, Letter to Editors, Legislator Letters, Letters to the FDA for the record, Congressional Testimony, etc. -- by our friends and allies. In terms of funding, I believe TI has the money already budgeted.

Mark

53141 9930

RJR0000000507132856
70053 7920
Source: http://industrydocuments.library.ucsf.edu/tobacco/docs/snmp0187

Responses by Ms. Kateri Callahan

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Analysis Group
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Clinton Vince
Dentons
Kandeh Yumkella

Questions and Responses for the Record

Ms. Kateri Callahan
President, Alliance to Save Energy

U.S. House of Representatives
Committee on Science, Space, and Technology

Hearing Date: Wednesday, February 10, 2016

From U.S. Rep. Elizabeth Esty

Ms. Callahan, in your testimony, you note that "an independent economic analysis of attaining the goal of doubling U.S. energy productivity found that doing so would 'recycle' $327 billion in energy cost savings back into the economy—we would create 1.3 million new jobs, reduce imported energy to represent only 7% of total consumption, and reduce CO2 emissions to one-third below the level emitted in 2005."

- In your view, is this goal of doubling U.S. energy productivity achievable? If so, what policies would you recommend we put in place to get there?

Response: *Yes, it is economically feasible to achieve. The Alliance and our partners have developed a comprehensive set of recommendations for policies that will help put the U.S. on track to double energy productivity. In September 2015, we released a Roadmap (http://www.energy2030.org/roadmap) that outlines a set of pathways and identifies specific actions a broad range of stakeholders (businesses; federal, state and local governments; universities and community colleges; and individual consumers) can take to advance towards the goal.*

- [Process Reengineering for Increased Manufacturing Efficiency (PRIME)] is succeeding in Connecticut, and I commend utilities like Connecticut Power and Light for their ongoing commitment to our state's manufacturers. If other states adopt similar policies, do you think this will get us to our goal of doubling U.S. energy productivity by 2030?

Response: *An ambitious program like PRIME is a good example of the sort of initiatives we will need to meet our goal. In order to double U.S. energy productivity by 2030, all states would need to embrace energy efficiency and implement and deploy fully throughout all buildings, businesses, and cities robust industrial, residential, commercial, and transportation programs that actually go well beyond those currently in place. The federal government will have a large role as well, supporting state efforts and enacting national-level policies aimed at maximizing energy efficiency gains. Our Roadmap (http://www.energy2030.org/roadmap) includes examples of these programs, which will reflect a significantly increased level of commitment to energy efficiency.*

Responses by Mr. Sam Batkins

QUESTIONS FOR THE RECORD
The Honorable Lamar Smith (R-TX)
U.S. House Committee on Science, Space, and Technology

Midnight Regulations: Examining Executive Branch Overreach

Thursday, February 25, 2016

Questions for Mr. Sam Batkins

1. The figure you showed during your oral testimony showed the number of midnight regulations – it was remarked that the number of regulations dropped precipitously in 2012 because the outcome of the Presidential election was uncertain. Could you discuss the merits of this argument? What does this figure look like if we put in data from 2013, 2014, and 2015?

Midnight regulation is generally defined as the period after the Presidential election, but before the next president takes office. One plausible reason why there was no spike in regulatory activity during the 2012 and 2004 periods is because the outcome of the election was certain. Incumbents had won and there was no incentive to rush regulation through OIRA and into the Federal Register. When there have been power transitions at the White House, in 2008 and 2000 for example, regulatory activity peaks during this period. However, there was little need to increase regulatory output after President Obama had already won the election in 2012.

The regulatory activity that followed easily accounted for any perceived drop in 2012. For example, multiple media outlets reported that the administration delayed a "Tier 3" rule for gasoline fuel. By 2014, the rule was finalized, with $14.5 billion in total costs. In the three years after the 2012 election, the administration has published more than $207 billion in regulatory burdens. Whether there is a spike in midnight regulatory activity in 2016 might depend on the outcome of the election and if the administration adheres to its promise to carefully scrutinize new rules.

Appendix II

Additional Material for the Record

LETTER SUBMITTED BY COMMITTEE RANKING MEMBER
EDDIE BERNICE JOHSNON

December 4, 2015

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Attention Docket ID No. EPA-HQ-OAR-2010-0505

Dear Administrator McCarthy:

We, the undersigned physicians, nurses, and health professionals, strongly support the U.S. Environmental Protection Agency's proposed rules to reduce industrial methane and volatile organic compounds (VOCs) from new oil and gas sources. These standards will not only help to mitigate climate change and its associated health risks by curtailing emissions of methane – an especially potent greenhouse gas – from new and modified sources, but will also limit emissions of toxic and carcinogenic air pollutants, benefiting public health in communities across the country. Furthermore, we call on EPA to develop standards to limit similar emissions from existing sources as well, to truly protect public health.

Climate change poses grave threats to public health. The changing climate threatens the health of Americans alive now and in future generations. Growing evidence over the past few years has demonstrated the multiple, profound risks that imperil the lives and health of millions (AAP, 2015, Luber et al., 2014; Pinkerton et.al, 2013; APHA, 2011; TfAH, 2009). Consequently, the nation has a short window to act to reduce those threats.

To protect our children, our communities and the public, the United States must significantly reduce greenhouse gases. Methane is a powerful greenhouse gas. Reducing methane is an essential step to reduce the burden of climate change, but the benefits go far outside the impact on the climate. Lifesaving benefits to public health can begin immediately.

Comprehensive methane standards would immediately reduce emissions of volatile organic compounds (VOC), which include gases recognized as hazardous air pollutants. Six organic hazardous air pollutants dominate the mass from oil and natural gas extraction and can most harm human health: benzene, toluene, carbonyl sulfide, ethylbenzene, mixed xylenes, and n-hexane. (EPA, 2015). Benzene and formaldehyde, another hazardous pollutant from oil and gas emissions, are recognized as known human carcinogens, while ethylbenzene is considered a probable carcinogen (HHS, 2011).

VOCs are also precursors to the formation of ozone when they react with nitrogen oxides in the presence of sunlight. By limiting emissions of VOCs, the proposed oil and natural gas standard will reduce the amount of ozone formed in the air and, consequently, the incidence of ozone-related health effects, including asthma attacks, hospital admission and premature deaths (EPA, 2013).

Some VOCs are also precursors to the formation of fine particulate matter, PM2.5. PM2.5 causes respiratory and cardiovascular harm, lung cancer and premature death (EPA 2009, Hamra, et al., 2014). Reducing emissions of VOCs will reduce the PM2.5 in the atmosphere, as well as decreasing the risk of asthma attacks, heart attacks and premature death from the PM2.5 (EPA, 2015).

Curtailing these emissions would particularly reduce the exposure to those most vulnerable.
A growing body of peer-reviewed science indicates that oil and gas development is associated with adverse health impacts, including premature birth, congenital heart defects, neural tube defects, and low birth weight for infants born to mothers living near natural gas development (Casey et al., 2015; McKenzie et al., 2014; Stacey et al., 2015). One recent analysis found that, as of June 2015, 84 percent of all peer-reviewed original research since 2009 on public health and modern oil and gas development suggested potential public health risks or actual adverse human health impacts (Hays and Shonkoff, 2015; Shonkoff et al., 2014).

People most at risk of harm from breathing these air pollutants from the oil and natural gas industry include: infants, children and teenagers; older adults; pregnant women; people with asthma and other lung diseases; people with cardiovascular disease; diabetics; people with low incomes; and healthy adults who work or exercise outdoors. Many live and work in communities near these oil and gas facilities, which are often located near lower income or minority communities.

The growing problem of methane in the atmosphere indicates that existing oil and gas infrastructure currently produce higher methane emissions than have been estimated (Brandt et al., 2014). One recent report estimated that nearly 90 percent of projected emissions from oil and gas development in 2018 will come from existing infrastructure (ICF, 2014). We need comprehensive rules that cover existing oil and gas wells and infrastructure to reduce methane emissions and the impact on climate. We unite in urging EPA to move quickly to address emissions from existing sources as well.

Sincerely,

Alabama
Susan Alexander, DNP, CRNP, ADM-BC
Azita Amiri, PhD, RN
Robert Barrington, PhD
Surya Bhatt, MD
Ellen Buckner, PhD, RN, CNE
Kathryn Chapman, DrPA
Mark Dransfield, MD
Bonnie Fleming, RN, CPHQ
deNay Kirkpatrick, DNP/Nurse Practitioner
Sherry Lawrence, DNP, RN
Teresa Magruder, MD, MPH
Shanone Medlock, MPH
S. Vamsee Raju, B.Pharm, PhD
Tammy Shikany, MAE, RRT, RCP
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Page Dobbs, MS
Susan Starks, ITS
James Wohlleb, MS

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Jill Arnstein, MPH
Dulce Becerra, MAEd, CHES
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Milton Bosch, MD
Nancy Boyce, BSN
Praveen Buddiga, MD
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Royce Calhoun, MD
Donna Carr, MD
Tze-Ming Chen, MD
Marcia Clark, RN
David Cooke, MD, FACS
Mary Lou De Natale, RN, EdD, CNL
A. Deckert, MD, MPH
Joan Edelstein, MSN, DrPH, RN
Sandy Ferreri, RN
Catherine Forest, MD, MPH
Amanda Gonzales, MPH
Robert Gould, MD
Brent Green, PhD, MPH
Anya Gutman, MPH
Stephen Hansen, MD, FACP
B. Darcel Harris Lee, Health Network President/CEO
Lisa Hartmayer, RN, MSN, NP-BC
Leslie Hata, DDS
Fred Herskowitz, MD
Marie Hoemke, RN, PHN, BSN, MA Ed, MA EdAdmin
Mark Horton, MD, MSPH
Mary Hunsader, RN, MSN, CNS, AE-C
Richard J. Jackson, MD, MPH
Martin Joye, MD
Michael Kelly, MD
Richard Kenney, RRT
Deniz Kursunoglu, MPH
Ware Kuschner, MD
Barbara Langham, RN, BSN
Lillian Lew, M.Ed, RDN
Elena Lingas, DrPH, MPH
Colleen Lynch, MD, MPH
Patricia Marlatt, RT
Diana McKee, RRT
Jennifer Miller, PhD
Patrick Moore, RRT, BHA
Scott Nass, MD, MPA, FAAFP
Pooneh Navab, MPH
Catherine O'Donnell, RN, BSN
Terry Olivares, MA, BSN, RN
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Ruth Thomas, FNP, MSN
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Economic Studies
at BROOKINGS

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Declining Business Dynamism in the United States: A Look at States and Metros

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Abstract

Business dynamism is the process by which firms continually are born, fail, expand, and contract, as some jobs are created, others are destroyed, and others still are turned over. Research has firmly established that this dynamic process is vital to productivity and sustained economic growth. Entrepreneurs play a critical role in this process, and in net job creation.

But recent research shows that dynamism is slowing down. Business churning and new firm formations have been on a persistent decline during the last few decades, and the pace of net job creation has been subdued. This decline has been documented across a broad range of sectors in the U.S. economy, even in high-tech.

Here, the geographic aspects of business dynamism are analyzed. In particular, we look at how these trends have applied to the states and metropolitan areas throughout the United States. In short, we confirm that the previously documented declines in business dynamism in the U.S. overall are a pervasive force throughout the country geographically.

In fact, we show that dynamism has declined in all fifty states and in all but a handful of the more than three hundred and sixty U.S. metropolitan areas during the last three decades. Moreover, the performance of business dynamism across the states and metros has become increasingly similar over time. In other words, the national decline in business dynamism has been a widely shared experience.

While the reasons explaining this decline are still unknown, if it persists, it implies a continuation of slow growth for the indefinite future, unless for equally unknown reasons or by virtue of entrepreneurship-enhancing policies (such as liberalized entry of high-skilled immigrants), these trends are reversed.

* Ian Hathaway would like to thank Jonathan Rothwell of the Brookings Institution for his thoughtful comments on earlier drafts.

National Dynamism

The American economy is in a constant state of churn. Historically one new business is born about every minute, while another one fails every eighty seconds.[1] In 2012, there were 13.4 million private sector jobs created or destroyed each quarter—that's equivalent to one in eight private sector jobs.[2] Despite all of that churning, only 600 thousand net jobs were created each quarter during that same year. That's equal to about half a percent of private employment.

Business dynamism is inherently disruptive; but it is also critical to long-run economic growth. Research has established that this process of "creative destruction" is essential to productivity gains by which more productive firms drive out less productive ones, new entrants disrupt incumbents, and workers are better matched with firms.[3] In other words, a dynamic economy constantly forces labor and capital to be put to better uses.

But recent evidence points to a U.S. economy that has steadily become less dynamic over time. Two measures used to gauge business dynamism are firm entry and job reallocation.[4] As Figure 1 shows, the firm entry rate—or firms less than one year old as a share of all firms—fell by nearly half in the thirty-plus years between 1978 and 2011.

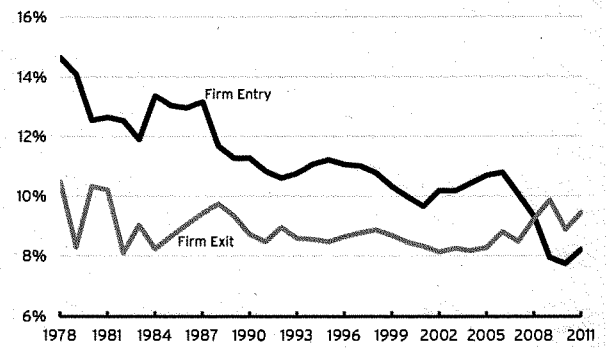
The precipitous drop since 2006 is both noteworthy and disturbing. For context, the rate of firm failures held relatively steady—aside from the uptick during the Great Recession. In other words, the level of business deaths kept growing along with the overall level of businesses in the economy, but the level of business births did not—it held relatively steady before dropping significantly in the recent downturn. In fact, business deaths now exceed business births for the first time in the thirty-plus-year history of our data (See figure A1 at Appendix).

A dynamic economy constantly forces labor and capital to be put to better uses, but recent evidence points to a U.S. economy that has *steadily become less dynamic over time.*

Figure 1.

The U.S. economy has become less entrepreneurial over time

Firm Entry and Exit Rates in the United States, 1978-2011

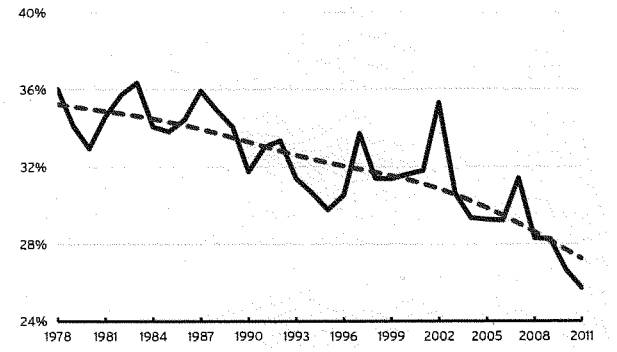


Source: U.S. Census Bureau, BDS; authors' calculations

Figure 2.

Business dynamism has been steadily declining over the last three decades

Job Reallocation Rate and Trend, 1978-2011



Source: U.S. Census Bureau, BDS; authors' calculations
Note: Trend is calculated by applying a Hodrick-Prescott filter with a multiplier of 400

Figure 2 illustrates that job reallocation—a broad measure of labor market churning resulting from the underlying business dynamism of firm expansions, contractions, births, and closures—has been steadily declining during the last three decades, and appears to have accelerated in the last decade or so. Overall, Figures 1 and 2 illustrate what was stated before—that the economy is engaged in a steady, secular decline in business dynamism.

This leaves the question of whether declining dynamism has been spreading evenly across the economy, or if these economy-wide aggregates are masking underlying structural changes. In forthcoming research, Decker, et al. (2014) use firm-level data to show that declining dynamism is a pervasive force in a broad range of sectors throughout the economy—even after controlling for changes in the underlying composition of firms (age, size, industry).[5] Even a cursory review of broader U.S. data aggregates shows that declining dynamism has reached a broad range of industrial sectors and firm size categories (See figures A2 and A3 at Appendix.

We would expect to see some regions in decline while others were immune. But, in fact, that is not what the data show.

To advance the conversation, we analyze business dynamism geographically. In particular, we examine whether underlying changes in the geographical composition of the U.S. economy have played a role in declining dynamism. If the decline were partially the result of changes in the geographic composition of the economy, we might expect to see a shift in activity away from more dynamic regions into less dynamic ones and a wide variation in the performance of dynamism across regions. In other words, we would expect to see some regions in decline while others were immune. But, in fact, that is not what the data show.

Regional Dynamism

Figure 3 shows the relationship between each of our two key measures of business dynamism–firm entry rate and job reallocation rate–in the late 1970s compared with recent years for the 50 U.S. states and 366 metropolitan areas. The same comparison is made for the firm exit rate.

To reduce any noisiness in the data from year to year–in particular for metros–the average of the earliest three years of our data are used as the starting point of comparison and the average of the latest three years are used as the end point. Each dot represents a state or metro, and the coordinates represent average values for a particular dynamism measure in 1978-1980 (vertical axis) versus 2009-2011 (horizontal axis).

Each panel in Figure 3 also has an angled line creating symmetry in the top and bottom halves of the chart. Doing this illustrates the relative performance of a measure–in this case, measures of business dynamism–in one period versus another. Dots above the line indicate higher activity for a particular measure in a state or metro in 1978-1980 relative to 2009-2011, while dots below the line indicate the opposite. A dot directly on the line represents a state or metro that had the same rate of activity in both periods.

For example, Ohio had a firm entry rate of 11 percent in 1978-1980 compared with 6 percent in 2009-2011, and is therefore represented by a dot above the line. On the other hand, Ann Arbor, Michigan had a job reallocation rate of 28 percent in 2009-2011 versus 25 percent in 1978-1980; placing it below the line. Cleveland, Tennessee and Dubuque, Iowa had job reallocation rates that were nearly identical in both years, and are therefore represented by dots near the line.

> Firm entry rates were *lower in each state and all but one metro area* compared with three decades ago, and job reallocation rates were lower in each of the states and in all but a dozen metros during the same period.

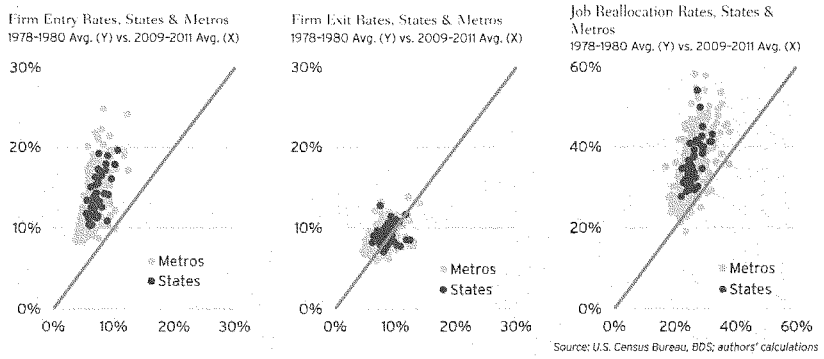
Figure 3 tells a clear story of declining business dynamism that is nearly universal across the U.S. regions. Firm entry rates were lower in each state and all but one metro compared with three decades ago, and job reallocation rates were lower in each of the states and in all but a dozen metros during the same period. For comparison, firm exits were much more similar to rates experienced thirty-plus years prior relative to these other measures of economic dynamism.

3

Figure 3.

Declining business dynamism is nearly universal across all U.S. regions

Dots above the line indicate higher activity for a particular measure in a state or metro in 1978-1980 relative to 2009-2011, while dots below the line indicate the opposite.



Source: U.S. Census Bureau, BDS; authors' calculations

Regional Variation

So far we have established that business dynamism–as measured by firm entry rates and job reallocation rates–has been on a steady, persistent decline nationally in the thirty-plus years for which data are available. Outside of the occasional blip from business cycle fluctuations, the trend has clearly been down during this period. We also established that the decline appears to be widespread geographically, reaching every state and nearly all U.S. metros.

But, it is possible that comparing two data points three decades apart misses a lot of variation of the underlying states and metros in the interim years. Since it is difficult to visually compare 50 states and 366 metros over time, here a statistical technique is implemented to provide a broad measure of relative performance among these geographic entities over time.

Figure 4 shows the standard deviation–a measure of variance–for three measures of business dynamism across the states and metros between 1978 and 2011. Each standard deviation has been weighted by the relative size of each of its underlying entities. For example, California would receive greater weighting in the standard deviation measure than would Delaware.

The purpose of this exercise is to reveal how similarly these states and metros perform relative to one another and whether they have become more or less similar over time. If it were the case of similar behavior we would expect to see low measures of standard deviation. Likewise, if it were the case that states and metros are behaving more similarly over time we would expect the standard deviations to become smaller in later years versus three decades ago. Figure 4 shows this to be the case–albeit to varying degrees and in different ways across geographic entities and measures of business dynamism.

Given the greater diversity of activity across an entire state than in any individual metropolitan area, it is not surprising that metros have higher standard deviations relative to states. Also not surprising is the fact that firm entry rates and firm exit rates exhibit lower variation, while the performance of job reallocation across states and metros is much greater. This is true at the national level - job reallocation is a much more volatile number from one year to the next - so one would expect this to be true at the sub-national levels as well.

Firm entry and exit rates have been low and fairly stable since the late 1980s. Aside from the increase (decrease) in standard deviation of firm entry rates during the run-up (aftermath) to the Great Recession, and the increase in firm failure rates in the years that followed, these two figures show that both states and metros have exhibited relatively high similarity on these two measures over time.

> Put simply, the broad decline in business dynamism occurring during the last few decades nationally *is not isolated to a few regions.*

Perhaps most striking is the convergence among states and metros on the job reallocation rate–our broadest measure of overall business dynamism. Though exhibiting much more variability than our other measures (higher standard deviations), the data also show a steady decline in the standard deviation of these rates. In other words, states and metros are increasingly performing much more alike on this higher variability measure of business dynamism; all of this within the context of falling dynamism overall.

Put simply, when combined with Figure 3, Figure 4 shows that the broad decline in business dynamism occurring during the last few decades nationally is not isolated to a few regions. In fact, the data show that it is a pervasive force evident in nearly all corners of the country.

Figure 4.

States and metros are behaving more similarly over time

When combined with Figure 3, these figures show that the broad decline in business dynamism occurring during the last few decades nationally is not isolated to a few regions.

Figure 4a. Weighted Standard Deviation of Firm Entry Rates – States and Metros (1978–2011)

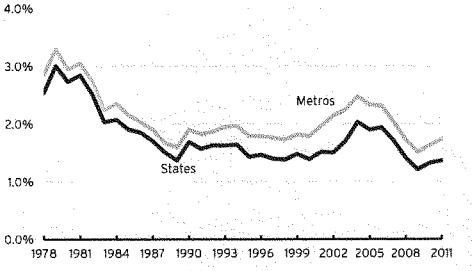


Figure 4b. Weighted Standard Deviation of Firm Exit Rates – States and Metros (1978–2011)

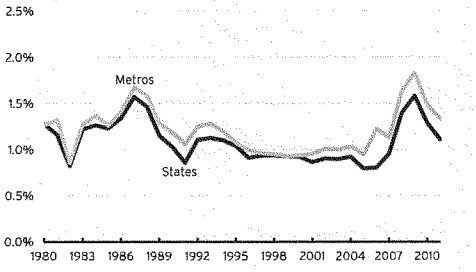
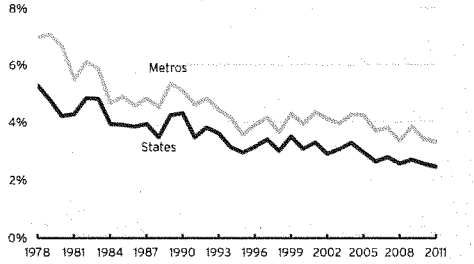


Figure 4c. Weighted Standard Deviation of Job Reallocation Rates – States and Metros (1978–2011)



Conclusion

Overall, the message here is clear. Business dynamism and entrepreneurship are experiencing a troubling secular decline in the United States. Existing research and a cursory review of broad data aggregates show that the decline in dynamism hasn't been isolated to particular industrial sectors and firm sizes. Here we demonstrated that the decline in entrepreneurship and business dynamism has been nearly universal geographically the last three decades—reaching all fifty states and all but a few metropolitan areas.

Our findings stop short of demonstrating why these trends are occurring and perhaps more importantly, what can be done about it. Doing so requires a more complete knowledge about what drives dynamism, and especially entrepreneurship, than currently exists. But it is clear that these trends fit into a larger narrative of business consolidation occurring in the U.S. economy—whatever the reason, older and larger businesses are doing better relative to younger and smaller ones. Firms and individuals appear to be more risk averse too—businesses are hanging on to cash, fewer people are launching firms, and workers are less likely to switch jobs or move.

Whatever the reason, older and larger businesses are doing better relative to younger and smaller ones.

To be sure, three years have passed since our latest data were collected in March 2011, so it's entirely possible that some of these negative trends have reversed—or at least stabilized—since then. Future data releases will reveal what has occurred in recent years, and we'll be monitoring that closely. However, one way to ensure a more dynamic economy going forward is for the federal government to adopt policies that better facilitate entrepreneurship.

Perhaps the best and most immediately effective way to do this is to significantly expand the numbers of immigrant entrepreneurs granted permanent work visas to enter and remain in this country. Allowing foreign graduates of U.S. schools who concentrate in the so-called STEM fields (science, technology, engineering and math) to remain in the United States to work for other enterprises is also an imperative, especially given the historical pattern indicating that immigrants are twice as likely to launch businesses as native-born Americans.

At the state and local level, governments, educational institutions, entrepreneurs, investors and foundations should continue to experiment with ways to encourage new business formation. The increasing popularity of "business accelerators" throughout the country is a welcome development that should be nurtured.

Finally, policy makers, citizens, owners, employers and entrepreneurs must not be afraid of dynamism, or change, even though it can be unsettling for a time. To paraphrase President Clinton, we must make "change our friend," because to resist it is to settle not only for the status quo, but in a world in which other countries and citizens are improving their skills, products and services, the failure to change will only ensure continued decline.

Endnotes

1. U.S. Census Bureau, Business Dynamics Statistics; authors' calculation.

2. Bureau of Labor Statistics, Business Employment Dynamics; authors' calculation.

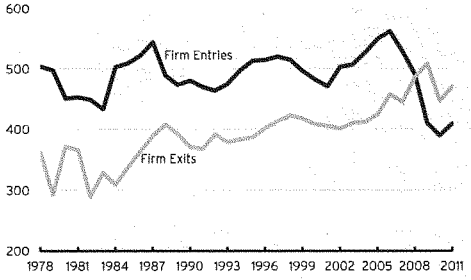
3. See Syverson (2011), "What Determines Productivity?," Journal of Economic Literature, 49(2): 326-65; Haltiwanger (2011), "Job Creation and Firm Dynamics in the U.S.," Innovation Policy and the Economy, Volume 12, NBER.

4. Haltiwanger (2011), "Job Creation and Firm Dynamics in the U.S.," Innovation Policy and the Economy, Vol. 12, *NBER*.

5. Decker, Haltiwanger, Jarmin, and Miranda (2014), "Entrepreneurship and Job Creation in the U.S.," *forthcoming*.

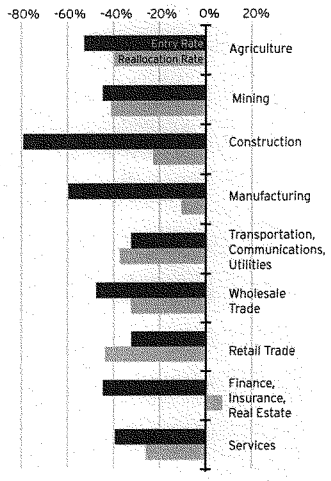
Appendix Charts

Figure A1: Firm Entries and Firm Exits in Thousands (1978–2011)



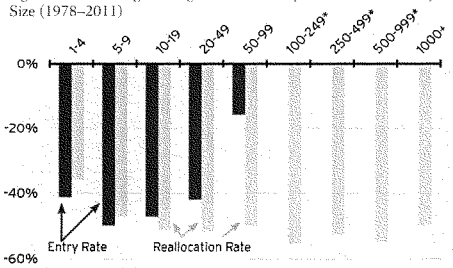
Source: U.S. Census Bureau, BDS

Figure A2: Percentage Change in Business Dynamism Measures by Sector (1978–2011)



Source: U.S. Census Bureau, BDS; authors' calculations

Figure A3: Percentage Change in Business Dynamism Measures by Firm Size (1978–2011)



Source: U.S. Census Bureau, BDS; authors' calculations
Note: (*) indicates that entry rates are excluded because new firms represent less than one percent of all firms; it is also unlikely that these represent new firms in the traditional sense, and are more likely expansions of foreign multinational firms. See Stangler and Kedrosky (2010), "Neutralism and Entrepreneurship: The Structural Dynamics of Startups, Young Firms, and Job Creation"

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JANUARY 13, 2015

American Entrepreneurship: Dead or Alive?

by Jim Clifton
Chairman and CEO of Gallup

Story Highlights

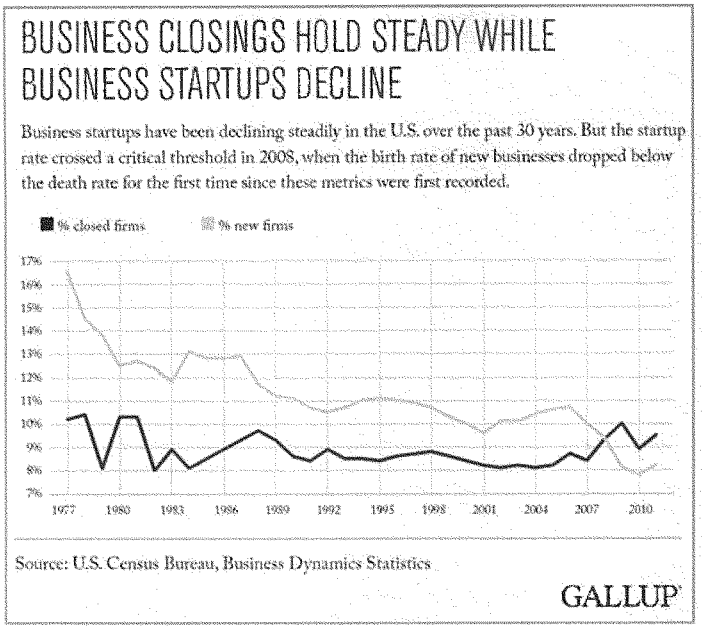
- *The birth and death trends of U.S. business must be reversed*
- *The economy is more important to security than the military*
- *America has misdiagnosed the cause and effect of job creation*

The U.S. now ranks not first, not second, not third, but 12th among developed nations in terms of business startup activity. Countries such as Hungary, Denmark, Finland, New Zealand, Sweden, Israel and Italy all have higher startup rates than America does.

We are behind in starting new firms per capita, and this is our single most serious economic problem. Yet it seems like a secret. You never see it mentioned in the media, nor hear from a politician that, for the first time in 35 years, American business deaths now outnumber business births.

The U.S. Census Bureau reports that the total number of new business startups and business closures per year -- the birth and death rates of American companies -- have crossed for the first time since the measurement began. I am referring to employer businesses, those with one or more employees, the real engines of economic growth. Four hundred thousand new businesses are being born annually nationwide, while 470,000 per year are dying.

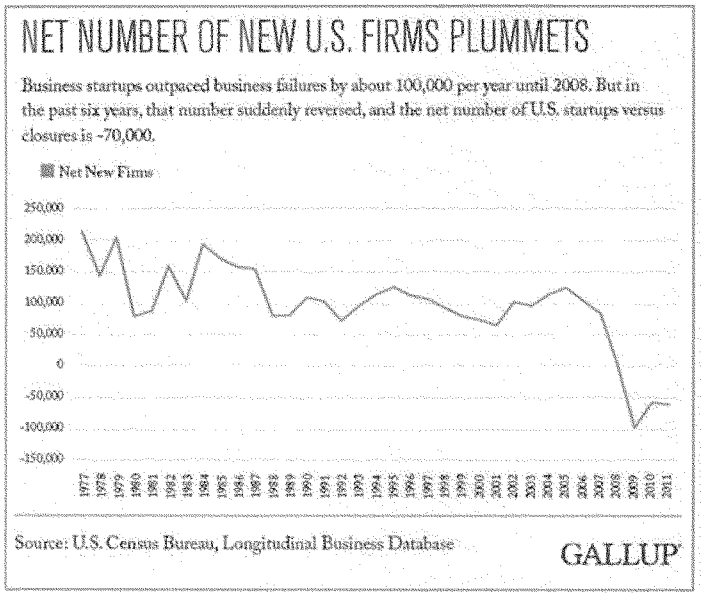
You may not have seen this graph before.



Until 2008, startups outpaced business failures by about 100,000 per year. But in the past six years, that number suddenly turned upside down. There has been an underground earthquake. As you read this, we are at minus 70,000 in terms of business survival. The data are very slow coming out of the U.S. Department of Census, via the Small Business Administration, so it lags real time by two years.

Net Number of New U.S. Firms Plummets

Business startups outpaced business failures by about 100,000 per year until 2008. But in the past six years, that number suddenly reversed, and the net number of U.S. startups versus closures is minus 70,000.


NET NUMBER OF NEW U.S. FIRMS PLUMMETS
Business startups outpaced business failures by about 100,000 per year until 2008. But in the past six years, that number suddenly reversed, and the net number of U.S. startups versus closures is -70,000.
Net New Firms
250,000
200,000
150,000
100,000
50,000
0
-50,000
-100,000
-150,000
Source: U.S. Census Bureau, Longitudinal Business Database
GALLUP

My hunch is that no one talks about the birth and death rates of American business because Wall Street and the White House, no matter which party occupies the latter, are two gigantic institutions of persuasion. The White House needs to keep you in the game because their political party needs your vote. Wall Street needs the stock market to boom, even if that boom is fueled by illusion. So both tell us, "The economy is coming back."

Let's get one thing clear: This economy is never truly coming back unless we reverse the birth and death trends of American businesses.

Dead-Wrong Thinking

It is catastrophic to be dead wrong on the biggest issue of the last 50 years -- the issue of where jobs come from. Our leadership keeps thinking that the answer to economic growth and ultimately job creation is more innovation, and we continue to invest billions in it. But an innovation is worthless until an entrepreneur creates a business model for it and turns that

innovative idea in something customers will buy. Yet current thinking tells us we're on the right track and don't need different strategies, so we continue marching down the path of national decline, believing innovation will save us.

I don't want to sound like a doomsayer, but when small and medium-sized businesses are dying faster than they're being born, so is free enterprise. And when free enterprise dies, America dies with it.

Let's run some numbers. You will often hear from otherwise credible sources that there are 26 million businesses in America. This is misleading; 20 million of these reported "businesses" are inactive companies that have no sales, profits, customers or workers. The only number that is useful and instructive is the number of current operating businesses with one or more employees.

There are only 6 million businesses in the United States with one or more employees. Of those, 3.8 million have four or fewer employees -- mom and pop shops owned by people who aren't building a business as much as they are building a life. And God bless them all. That is what America is for. We need every single one of them.

Next, there are about a million companies with five to nine employees, 600,000 businesses with 10 to 19 employees, and 500,000 companies with 20 to 99 employees. There are 90,000 businesses with 100 to 499 employees. And there are just 18,000 with 500 employees or more, and that figure includes about a thousand companies with 10,000 employees or more. Altogether, that is America, Inc.

Let me be very clear. America, Inc. is far more important to America's security than our military. Because without the former prospering -- and solvent -- there is no latter. We have enormous military power only because of a growing economy that has, so far, made it possible for the government to pay its bills. When former Chairman of the Joint Chiefs of Staff, Adm. Mike Mullen, was asked in a Senate hearing on June 28, 2011, to name the biggest current threat to the security of the United States, he didn't say al-Qaida. He didn't say Iran's nuclear capabilities. He answered, "I believe our debt is the greatest threat to our national security."

Declining Businesses Mean Declining Revenues for Social Spending

Keep in mind that these 6 million businesses, especially small and medium-sized ones, provide jobs for more than 100 million Americans and much of the tax base for everything. These small, medium and big businesses have generated the biggest economy in the world, which has allowed the country to afford lavish military and social spending and entitlements. And we've been able to afford all of this because, until now, we've dominated the world economy.

When new businesses aren't being born, the free enterprise system and jobs decline. And without a growing free enterprise system, without a growing entrepreneurial economy, there are no new good jobs. That means declining revenues and smaller salaries to tax, followed by declining aid for the elderly and poor and declining funding for the military, for education, for infrastructure -- declining revenues for everything.

America has maintained the biggest tax coffers in the world because its 300+ million citizens have produced and owned one-quarter of virtually all global wealth. The United States clobbered everyone in the battle of free enterprise, in the battle of business building, and in the battle of inventing the future. Until recently, America had blown the world away in terms of economic success. We are now quickly losing that edge, and everything we're trying to do to fix the problem is dead wrong.

Here's why: Entrepreneurship is not systematically built into our culture the way innovation or intellectual development is. You might say, "Well, I see a lot of entrepreneurial activity in the country." Yes, that's true, but entrepreneurship is now in decline for the first time since the U.S. government started measuring it.

The whole country and subsequently the world are having their own dead-wrong moment, and it is causing America and the whole world to make everything worse. And people know it, though they may not know why. When Gallup asked Americans to rate how much they personally worry about particular problems facing the country, the top three issues that respondents worry about a "great deal" were the economy (59%), federal spending and the budget deficit (58%), and the availability and affordability of healthcare (57%).

The more we execute on our leadership's erroneous belief in innovation, the more our engine stalls out -- and the more people rightly worry about economic issues.

Because we have misdiagnosed the cause and effect of economic growth, we have misdiagnosed the cause and effect of job creation. To get back on track, we need to quit pinning everything on innovation, and we need to start focusing on the almighty entrepreneurs and business builders. And that means we have to find them.

Jim Clifton is Chairman and CEO of Gallup. He is the author of *The Coming Jobs War* and coauthor of *Entrepreneurial StrengthsFinder*.

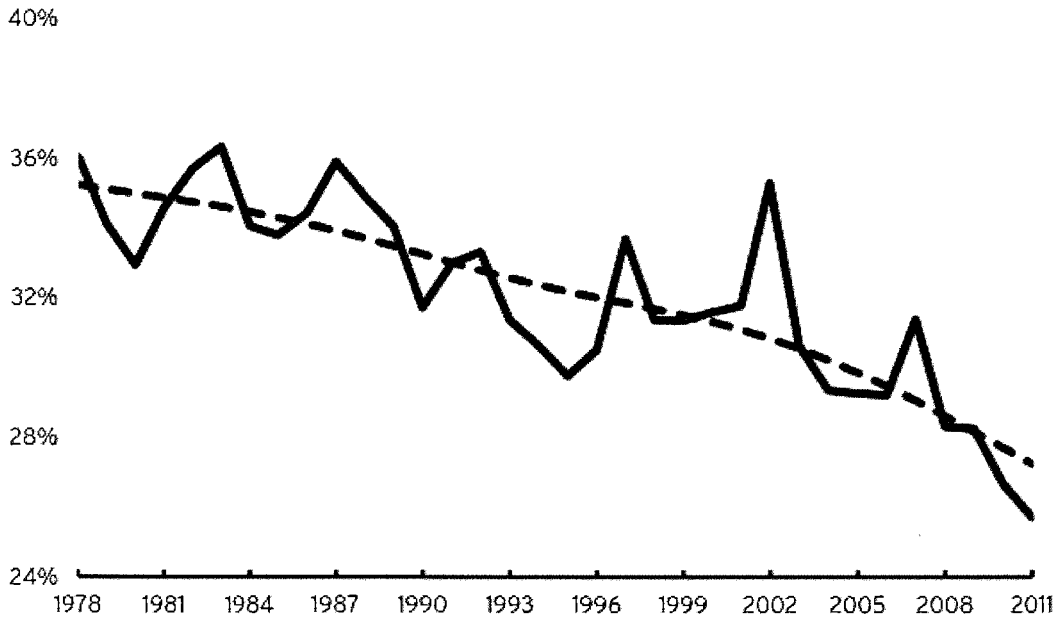
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Figure 2.

Business dynamism has been steadily declining over the last three decades

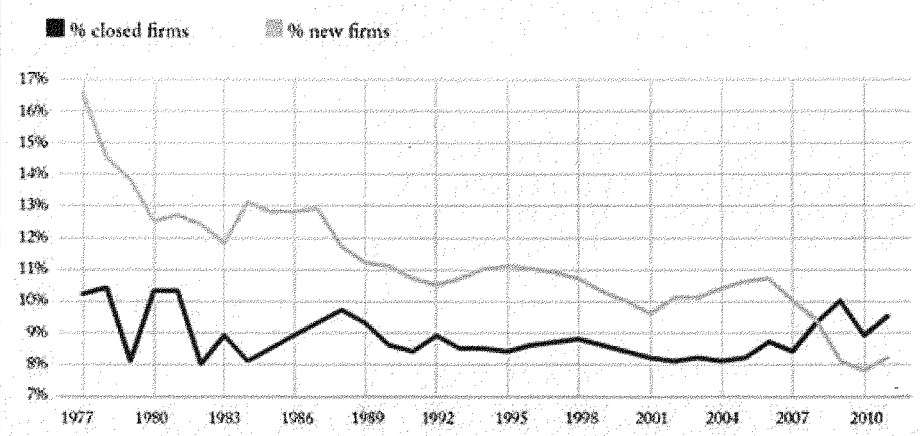
Job Reallocation Rate and Trend, 1978-2011



Source: U.S. Census Bureau, BDS; authors' calculations
Note: Trend is calculated by applying a Hodrick-Prescott filter with a multiplier of 400

BUSINESS CLOSINGS HOLD STEADY WHILE BUSINESS STARTUPS DECLINE

Business startups have been declining steadily in the U.S. over the past 30 years. But the startup rate crossed a critical threshold in 2008, when the birth rate of new businesses dropped below the death rate for the first time since these metrics were first recorded.



Source: U.S. Census Bureau, Business Dynamics Statistics

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DOCUMENTS SUBMITTED BY REPRESENTATIVE ERIC SWALWELL

PHILIP MORRIS MANAGEMENT CORP. INTER-OFFICE CORRESPONDENCE
1341 G STREET, N.W., SUITE 900, WASHINGTON, DC 20005

To: David Nicoli **Date:** January 11, 1998

From: John Hoel

Subject: Strategic Plan for Senate Environment and Public Works Committee Hearings

cc: Steve Parrish
Howard Liebengood
Ellis Woodward
Mark Berlind

At this time, we are aware of at least two hearings in the Senate Environment and Public Works Committee on the ETS provisions of the Proposed Resolution. The first is a January 21st field hearing in Rhode Island.

Our general goal for the hearings and markup should be to end up with restrictions on smoking in public buildings which are similar to our draft bill. This will be a challenge, as all three Senate bills differ in some significant way from the PR. Specifically, the McCain, Kennedy and Hatch bills extend the prohibition on smoking outdoors to the vicinity of the building entrance. This would be further harassment for our customers. Pushing these people out from under the vestibule and into the elements could virtually eliminate smoking in the workplace, unless the employers installs the required ventilation systems. President Clinton included an "in the vicinity" restriction in his draft Executive Order, but due to opposition removed the language in the final EO.

1. Congressional Hearings:

Chris Hessler, Chafee's committee staffer responsible for the hearings, told us the January 21st hearing will consist of two panels. In order to educate the members of the committee, the first panel will explore the history of the federal government's regulation of smoking. There will be government witnesses, but we have no indication of who will testify. Chris did not appear to want Carol Browner.

The second panel will investigate smoking restriction options and affected industries. Chris specifically mentioned small and chain restaurants, bars, public health, building managers and possibly the tobacco industry. We know Chris does not give much credence to EPA cancer risk assessment and he does not want the hearing to turn into a debate about the science.

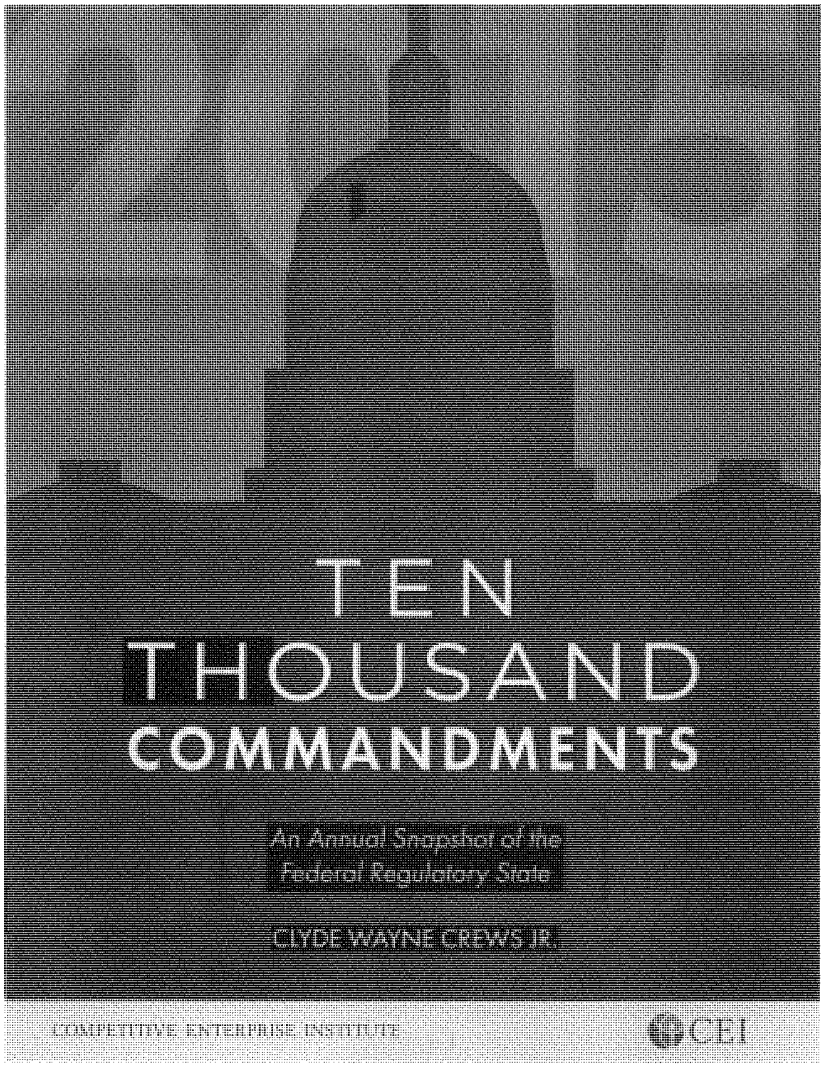
Chris Hessler has been reticent to share information about witnesses, so we may be very limited in what we can do. As with OSHA's IAQ hearings, our allies are our most important asset. Educating and mobilizing them must be a top priority.

We can have a much greater impact on the second panel.

Action items for second panel:

- I've called Rick Berman, counsel to **American Beverage Institute**, which represents chain restaurants, and asked him to identify members to testify. I specifically requested restaurants which are headquartered in:
  - Rhode Island (Chafee),
  - Florida (Graham) (Outback Steak House is headquartered in Florida and the CEO is close to Graham),
  - New Jersey (Lautenberg)--we'll also use the casinos with him,
  - Missouri (Bond) (Houlihan's), and
  - Colorado (Allard) (VICORP restaurants--Village Inns and Bakers Square--which have no bar area and 35% of their customer base smoke.)
- Deb Leach, Executive Director of the **NLBA**, has identified bar owners in Montana (Baucus), Idaho (Kempthorne), Wyoming (Thomas) & Oklahoma (Inhofe) to testify and meet personally with the Senators.
- Lanny Griffith and I are scheduled to meet with Bill Sitman, Executive Director of the **American Gaming Association**, to discuss strategy, particularly with regard to Harry Reid and Lautenberg. I also hope to work with the major casinos and their respective state associations as well.
- I spoke with Elaine Graham, the Senior Vice President for Government Affairs of the **National Restaurant Association**, to see whether they will be helpful and possibly submit testimony. RJR is on the Board of the NRA and will take the lead. The issue of NRA's position on the PR will be on the agenda for the January 18th Board of Directors meeting.
- Call the **International Society of State Restaurant Association Executives** to see if state association Presidents from states represented on the committee could submit testimony.
- I tasked Eric Ostern with PMUSA to schedule a meeting for me with the VP for Government Affairs at the **American Hotel & Motel Association**.
- **Hotel and Restaurant Employees** and **BCT**. I've spoken with Jarvis and Mike Tinor. We should prepare testimony and see if the committee will invite them or at least allow them to submit written testimony. (See California HRE suit on smoking ban)
- **I will call Karen Kerrigan with the Small Business Survival Committee and ask whether she would consider testifying. She has done some very good work, having several letters to the editor published on the OSHA issue.**
- Draft written testimony. All of the aforementioned groups should have written testimony prepared for the January 21st hearing, whether the testify or submit it for the record. I have retrieved the OSHA IAQ hearing

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TEN
THOUSAND
COMMANDMENTS
An Annual Snapshot of the Federal Regulatory State
CLYDE WAYNE CREWS JR.
COMPETITIVE ENTERPRISE INSTITUTE
CEI

Ten Thousand Commandments

An Annual Snapshot of the Federal Regulatory State

2015 Edition

by Clyde Wayne Crews Jr.

Executive Summary

In January 2015, the Congressional Budget Office (CBO) reported outlays for fiscal year (FY) 2014 of $3.5 trillion and projected spending for FY 2015 at $3.656 trillion.[1] The CBO projected that spending would reach $4 trillion by 2017, whereas President Barack Obama's federal budget proposal for FY 2016 already seeks $3.999 trillion in discretionary, entitlement, and interest spending.[2] High debt and deficits notwithstanding, $4 trillion in annual spending will soon be the new normal.

Trillion dollar deficits were once unimaginable. Such sums typified the level of budgers themselves, not shortfalls. Spending is not projected to balance revenue at any point in the coming decade. We experienced trillion dollar deficits between 2009 and 2012,[3] and the CBO projects that deficits will exceed $1 trillion again by FY 2025.[4] In the near term, President Obama's 2016 budget projects smaller deficits than recent highs—with $485 billion in 2014 expected to jump to an estimated $583 billion in 2015 before dipping and then heading back to $600 billion and beyond.[5]

Many other countries' government outlays make up a greater share of their national output, compared with about 20 percent for the U.S. at the federal level. But in absolute terms, the U.S. government is the largest government on the planet.[6] Only five other nations top $1 trillion in annual government revenues, and none but the United States and now China—for the first time—collect more than $2 trillion.[7]

Like federal spending, regulations and their costs should be tracked and disclosed annually. Then, periodic housecleaning should be performed. Cost-benefit analysis at the agency level is already deficient; such analyses accompany only a fraction of rules.[8]

A problem with cost-benefit analysis is that it relies primarily on agency self-reporting. Having agencies audit their own rules is like asking students to grade their own exams. Regulators are disinclined to emphasize

when a rule's benefits do not justify its costs. In fact, one could expect agencies to devise new and dubious categories of benefits to justify an agency's rulemaking activity.[9]

A major source of overregulation is the systematic overdelegation of rulemaking power to agencies. Requiring expedited votes on economically significant or controversial agency rules before they become binding would reestablish congressional accountability and help affirm a principle of "no regulation without representation."

Openness about regulatory facts and figures can be bolstered through federal "regulatory transparency report cards," similar to the presentation in the annual *Ten Thousand Commandments* report.[10] These report cards could be officially issued each year to distill information for the public and policy makers about the scope of the regulatory state.

Federal environmental, safety and health, and economic regulations affect the economy by hundreds of billions—perhaps trillions—of dollars annually, in addition to the official dollar outlays that dominate the federal policy debate.

Regulation: The Hidden Tax

The scope of federal government spending and deficits is sobering. The national debt topped $18 trillion in December 2014,[11] the same month the International Monetary Fund calculated China's economy to be worth $17.6 trillion in terms of purchasing power parity, making it the world's largest economy (albeit still significantly lagging the United States on a per capita basis).[12] Yet the federal government's reach extends well beyond Washington's taxes, deficits, and borrowing. Federal environmental, safety and health, and economic regulations affect the economy by hundreds of billions—perhaps trillions—of dollars annually, in addition to the official dollar outlays that dominate the federal policy debate.

Firms generally pass the costs of some taxes along to consumers.[13] Likewise, some regulatory compliance costs borne by businesses will find their way into the prices that consumers pay, affect the wages workers earn, and lead to lower levels of growth and prosperity. Precise regulatory costs can never be fully known because, unlike taxes, they are unbudgeted and often indirect.[14] But scattered government and private data exist about the number of regulations issued, their costs and effects, and the agencies that issue them. Compiling some of that information can make the federal regulatory enterprise somewhat more comprehensible. That compilation is one purpose of *Ten Thousand Commandments*, highlights of which follow:

- Based on the best available federal government data, past reports, and contemporary studies, this report highlights estimated regulatory compliance and economic costs of $1.88 trillion annually.[15]
- In 2014, 224 laws were enacted by Congress during the calendar year, whereas 3,554 rules were issued by agencies.[16] Thus, 16 rules were issued for every law enacted last year. The "Unconstitutionality Index," the ratio of regulations issued by agencies to laws passed by Congress and signed by the president, was 16 for 2014 and 51 for 2013. The average for the decade has been 26. This disparity highlights the delegation of lawmaking power to unelected agency officials.
- If one assumed that all costs of federal regulation and intervention flowed all the way down to households, U.S. households would "pay" $14,976 annually on average in regulatory hidden tax. That payment amounts to 23 percent of the average income of $63,784 and 29 percent of the expenditure budget of $51,100. The "tax" exceeds every item in the budget except housing. More is "spent" on embedded regulation than on health care, food, transportation, entertainment, apparel and services, and savings.
- The estimated cost of regulation exceeds half the level of the federal spending itself, which was $3.5 trillion in 2014.
- Regulatory costs of $1.88 trillion amount to 11 percent of the U.S. GDP, which was estimated at $17.4 trillion in 2014 by the Commerce Department's Bureau of Economic Analysis.
- When regulatory costs are combined with federal FY 2014 outlays of $3.5 trillion, the federal government's

share of the entire economy now reaches 30.6 percent.
- The costs of the regulatory "hidden tax" surpass federal income tax receipts. Regulatory compliance costs exceed 2014 total individual income tax revenues of $1.386 trillion.
- Regulatory compliance costs vastly exceed the 2014 estimated U.S. corporate income tax revenues of $333 billion and rival corporate pretax profits of $2.235 trillion.[17]
- If it were a country, U.S. regulation would be the world's tenth-largest economy, ranking behind Russia and ahead of India.
- U.S. regulatory costs exceed each of the GDPs of Australia and Canada, the highest income nations among the countries ranked most free in the annual *Index of Economic Freedom* and *Economic Freedom of the World* reports.
- The Weidenbaum Center at Washington University in St. Louis and the Regulatory Studies Center at George Washington University in Washington, D.C., jointly estimate that agencies spent $59.5 billion (on budget) to administer and police the regulatory enterprise. Adding the $1.88 trillion in off-budget compliance costs brings the total reckoned regulatory enterprise to about $1.94 trillion.
- Among the six all-time-high *Federal Register* page counts, five have occurred under President Obama.
- The annual outflow of more than 3,500 final rules—sometimes far above that level—means that 90,836 rules have been issued since 1993.
- The *Federal Register* finished 2014 at 77,687 pages, the sixth-highest level in its history.
- *Federal Register* pages devoted specifically to final rules stand at 24,861 in 2014. The record high is 26,417 in 2013.
- The 2014 *Federal Register* contained 3,554 final rules and 2,383 proposed rules.
- Since the nation's founding, more than 15,209 executive orders have been issued. President Obama issued 215 by the end of 2014.
- President George W. Bush's administration averaged 62 major rules annually during his eight years in office; Obama's six years so far have averaged 81.
- Whereas the federal government issues more than 3,500 rules annually, public notices in the *Federal Register* normally exceed 24,000 annually, with uncounted "guidance documents" and other materials among them. There were 23,970 notices in 2014, and there have been 501,899 since 1995.
- Sixty federal departments, agencies, and commissions have 3,415 regulations at various stages of implementation, according to the 2014 "Regulatory Plan and the Unified Agenda of Federal Regulatory and Deregulatory Actions," which lists federal regulatory actions at various stages of implementation.
- Of the 3,415 regulations in the pipeline, 200 are "economically significant" rules, which the federal government defines as having annual effects on the economy of $100 million or more. Assuming that those rulemaking effects are primarily regulatory implies roughly $20 billion yearly in future off-budget regulatory costs.
- Of the 3,415 regulations now in the works, 674 affect small businesses. Of those, 374 required a regulatory flexibility analysis; 300 were otherwise noted by agencies to affect small businesses.
- The five most active rule-producing agencies—the departments of the Treasury, Interior, Commerce, Transportation, and Health and Human Services—account for 1,453 rules, or 43 percent of all rules in the Unified Agenda pipeline.
- The Environmental Protection Agency, which was formerly ranked consistently in the top five, is now sixth, but adding its 186 rules brings the total from the top six rulemaking agencies to 1,639 rules, or 48 percent of all federal rules.

If it were a country, U.S. regulation would be the world's tenth-largest economy, ranking behind Russia and ahead of India.

The short-lived series of budget surpluses from 1998 to 2001—the first since 1969—is ancient history given today's debt- and deficit-drenched policy setting. When it comes to stimulating a limping economy, reducing

overspending and relieving regulatory burdens are both vital to the nation's economic health. Otherwise, pressures to restrain budgers can incentivize lawmakers to impose off-budget regulations on the private sector, rather than ro add to unpopular deficir spending. For example, a new government program like job training could involve either increasing government spending or imposing new regulations requiring businesses to provide such training. Unlike on-budger spending, the latter regulatory costs remain largely hidden from public view, which can make regulation increasingly attractive to lawmakers.

Introduction: Toward a Rational Regulatory Budget

Congress's spending disclosure and accountability, although imperfect, are necessary conditions for a federal government to be accountable to voters. Washington funds its programs either by raising taxes or by borrowing—with a promise to repay with interest—from future tax collections. However controversial government spending programs may be, taxpayers can inspect costs in the federal budget's historical tables[18] and CBO publications.[19] The public can see what is going on.

However, the government can also "fund" objectives and programs through regulatory compliance, without using tax dollars. Rather than pay directly and book expenses for new initiatives, federal regulations can compel the private sector, as well as state and local governments, to bear the costs of federal initiatives.

Regulatory compliance and economic impact costs are not budgeted and lack the formal public disclosure that accompanies federal spending. Therefore, regulatory initiatives can enable federal direction of private-sector resources with comparatively little public fuss, rendering regulation a form of off-budget taxation. Policy makers find it easier to impose regulatory costs than to embark on more government spending because of the former's lack of disclosure and accountability for costs. Furthermore, where regulatory compliance costs prove burdensome, Congress can escape accountability by blaming an agency for issuing an unpopular rule.

Table 1 provides some perspective on the regulatory "tax" by presenting summary data for selected topics described in *Ten Thousand Commandments*. Trends over recent years are provided where information is available.

The 2015 edition of *Ten Thousand Commandments* contains four main sections:

1. An overview of the costs and scope of the regulatory state, such as its estimated size compared with federal budgetary components and GDP.
2. An analysis of trends in the numbers of regulations issued by agencies, based on information provided in the *Federal Register* and in "The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions."
3. Recommendations for reform that emphasize improving congressional accountability for rulemaking. This section offers steps to (a) improve regulatory disclosures through a regulatory transparency report card and (b) increase congressional responsibility to voters for costly and controversial rules.
4. An appendix containing historical tables of regulatory trends over past decades.

Rather than pay directly and book expenses for new initiatives, federal regulations can compel the private sector, as well as state and local governments, to bear the costs of federal initiatives.

Table 1. The Regulatory State: A 2014 Overview

	Year-End 2014	1-Year Change	5-Year Change (2010–2014)	10-Year Change (2005–2014)
Total regulatory costs	$1.88 trillion	1.07%	n/a	n/a
Agency enforcement budgets	$59.5 billion	1.9%	2.9%	24.5%
Federal Register pages	77,687	–1.9%	–4.5%	5.3%
Devoted to final rules	24,861	–5.9%	–0.2%	7.9%
Federal Register final rules	3,554	–2.9%	–0.5%	–10.6%
Code of Federal Regulations pages	175,268	–0.1%	5.9%	15.3%
Total rules in Agenda pipeline	3,415	3.3%	–19.2%	–15.9%
Completed	629	36.1%	–12.9%	0.6%
Active	2,321	–3.2%	–13.9%	–10.5%
Long term	465	4.3%	–42.4	–45.0%
"Economically significant" rules in the year-end pipeline	200	4.7%	–10.7%	47.1%
Completed	31	10.7%	–39.2%	14.8%
Active	131	0.0%	–6.4%	57.8%
Long term	38	18.8%	15.2%	46.2%
Rules affecting small business	674	0.7%	–20.2%	–14.5%
Regulatory flexibility analysis required	374	–4.3%	–12.6%	–4.1%
Regulatory flexibility analysis not required	300	7.9%	–28.1%	–24.6%
Rules affecting state governments	396	4.5%	–33.2%	–33.2%
Rules affecting local governments	231	7.6%	–27.6%	–24.3%
GAO Congressional Review Act reports on major rules	80	1.3%	–20.0%	42.9%
EPA Breakdown				
Final rules (*Federal Register*)	539	4.9%	12.5%	–0.4%
EPA rules in Agenda	186	3.9%	–46.1%	–53.5%
EPA rules affecting small business	6	0.0%	–93.7%	–94.5%
FCC Breakdown				
Final rules (*Federal Register*)	144	6.7%	44.0%	–37.9%
FCC rules in Agenda	132	0.0%	–10.2%	–7.7%
FCC rules affecting small business	98	–1.0%	–12.5%	–13.3%

Note: n/a = not applicable.

The Cost of Regulation and Intervention

Policy makers have a responsibility to disclose regulatory costs, whatever uncertainties exist in measuring them. Indeed, in many respects, costs are unmeasurable to third parties.[20] Given the inherent difficulty of accurately measuring costs and the fact that regulators are unelected, all reforms must move toward requiring our elected Congress to vote to approve regulations before they become effective.

The Office of Management and Budget's (OMB) *2014 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates*, which surveys regulatory costs and benefits, pegs the cumulative costs of 116 selected major regulations during the decade from 2003 to 2013 at between $68.5 billion and $101.8 billion (in 2010 dollars),[21] compared with 115 rules at between $57 billion and $84 billion in the 2013 report (in 2001 dollars).[22] Meanwhile, the estimated range for benefits in the new report spanned $261.7 billion to $1,042.1 billion (in 2010 dollars).[23]

The OMB's cost-benefit breakdown incorporates only rules for which both benefits and costs have been expressed in quantitative and monetary terms by agencies. It omits numerous categories and cost levels of rules. Rules from independent agencies are entirely absent.

For the fiscal year ending September 2013, the OMB's new publication reports only seven rules that had both benefit and cost analyses. These depict additional costs ranging from $2.4 billion to $3 billion (in 2010 dollars).[24] In the previous year's report, by contrast, the OMB had presented 14 rules with costs ranging from $14.8 billion to $19.5 billion annually (in 2001 dollars).[25] Several billion dollars more in annual rule costs generally appear in these reports for rules with only cost estimates, but these are not tallied and highlighted by the OMB.

In a 2014 report, the National Association of Manufacturers (NAM) modeled 2012 total annual regulatory costs in the economy of $2.028 trillion (in 2014 dollars).[26] Earlier governmental estimates before and after the turn of the century from the OMB, the Government Accountability Office (GAO), and the Small Business Administration (SBA) have also noted aggregate annual costs in the hundreds of billions of dollars, some well in excess of $1 trillion in today's dollars (see Table 2). Still another report, by economists John W. Dawson of Appalachian State University and John J. Seater of North Carolina State University, pushes regulatory cost impacts into the stratosphere via dozens of trillions of dollars in lost GDP annually, taking into account the long-term growth reduction caused by decades of costly economic regulation.[27]

Among these reports, the latest comprehensive federal government assessment of the entire federal regulatory enterprise that one might regard as "official" was prepared in September 2010 for the SBA.[28] Modeling techniques have changed over time for this now discontinued report, which the SBA had presented in several versions over the past decade and a half. The report estimated regulatory compliance costs of $1.752 trillion for 2008 and received significant criticism, to which the authors responded directly.[29]

The SBA report series' primary purpose was to examine the extent to which regulatory

Table 2. Assessments of Federal Regulation: Late 20th Century, Early 21st Century, Billions of Dollars

	Hopkins 1992 (1991 dollars)	Government Accountability Office 1995 (1995 dollars)	Hopkins 1995 (1995 dollars)	Small Business Admin. 2001 (2001 dollars)	Office of Management & Budget 2002 (2001 dollars)	Small Business Admin. 2005 (2004 dollars)	Small Business Admin. 2010	National Association of Manufacturers 2014 (2012 dollars)
Environmental	115		168	197	203	221	281	330
Other Social	36		55		30			
Transportation					22			
Labor					22			
Economic Regulation						591	1,236	1,448
Efficiency	73		80		150			
Transfers	130		147		337			
Efficiency - Domestic				101				
Transfers - Domestic				202				
Efficiency - Int'l Trade				44				
Transfers - Int'l Trade				88				
Workplace and Homeland Security				82		106	75	92
Paperwork/Process/ Info Collection (tax compliance)	189		218	129	190	195	160	159
Totals:	543	647	668	843	954	1,113	1,752	2,029
Totals, converted to 2013 $		992.498	1,024.712	1,109.39	1,255.46			

Sources: Thomas D. Hopkins, "Costs of Regulation: Filling the Gaps, Report prepared for the Regulatory Information Service Center," Washington, D.C., August 1992, http://www.thecre.com/pdf/COST%20OF%20REGULATION%20FILLING%20GAPS.pdf. General Accounting Office, Briefing Report to the Ranking Minority Member, Committee on Governmental Affairs, U.S. Senate, Regulatory Reform: Information on Costs, Cost Effectiveness, and Mandated Deadlines for Regulations, (GAO/PEMD 95 18BR), March 1995, http://archive.gao.gov/t2pbat1/153774.pdf. Thomas D. Hopkins, "The Changing Burden of Regulation, Paperwork, and Tax Compliance on Small Business: A Report to Congress," Office of the Chief Counsel for Advocacy, U.S. Small Business Administration, Washington, D.C., October 1995, http://www.sba.gov/advo/laws/archive/law_brd.html. Office of Management and Budget, "Draft Report to Congress on the Costs and Benefits of Federal Regulations," *Federal Register*, March 28, 2002, pp. 15037-15038. http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/dreport.pdf. W. Mark Crain and Thomas D. Hopkins, "The Impact of Regulatory Costs on Small Firms," report prepared for the Small Business Administration, Office of Advocacy, RFP No. SBAHQ-00-R-0027, October 2001. http://www.sba.gov/advo/research/rs207tot.pdf. W. Mark Crain, "The Impact of Regulatory Costs on Small Firms," report prepared for the Small Business Administration, Office of Advocacy, Contract no. SBHQ-03-M-0522, September 2005 https://www.sba.gov/sites/default/files/files/rs264tot.pdf. National Association of Manufacturers, "The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business," W. Mark Crain and Nicole V. Crain, September 10, 2014. http://www.nam.org/~/media/A7A8456F-3348E498F40CB46D616773 1a.ashx. Some figures here are adjusted to 2013 by the change in the consumer price index between 2001 and 2013 (1.316), and between 1995 and 2013, derived from "CPI Detailed Report Data for April 2014," Bureau of Labor Statistics, Washington, D.C. (Table 24. Historical Consumer Price Index for All Urban Consumers (CPI-U), U.S. city average, all items), http://www.bls.gov/cpi/cpid1404.pdf.

costs impose higher burdens on small firms, which have higher per employee regulatory costs. The exercise is vitally important, but the federal government now chooses to ignore it. The SBA and earlier OMB surveys traditionally have conveyed regulatory costs using the following categories:

- Economic regulatory costs (for example, market entry restrictions and transfer payments such as price supports that shift money from one pocket to another)
- Workplace regulatory costs
- Environmental regulatory costs
- Paperwork costs

The NAM model addresses the now-dropped size-of-firms question and finds overall annual per employee regulatory costs to firms to be $9,991 on average.[30] But the effects by firm size are disparate. Table 3 shows that per employee regulatory costs for firms of fewer than 50 workers can be 29 percent greater than those for larger firms—$11,724 for smaller firms versus $9,083 for larger ones.[31] Meanwhile, other developments—including the aftermath of recent major financial, health, and environmental policies—point to substantial regulatory costs not captured by most assessments to date.[32]

NAM estimates that regulatory costs now exceed $2 trillion, whereas other reports imply far more.[33] To allow for incremental updates to an aggregate baseline, one may compile estimates of compliance and economic costs for the federal regulatory enterprise mainly by using the OMB annual *Report to Congress* on costs and benefits over the years, data such as paperwork burdens described in the OMB's annual *Information Collection Budget*, independent agency costs, and other publicly available material and third-party assessments. The goal is for data to converge over time on some informal baseline encompassing new information about economic and regulatory cost burdens, as compared to more formal top-down modeling such as that used by NAM. Using this approach, we arrive at an across-the-board cost estimate for federal regulation and intervention at $1.88 trillion annually (see Figure 1).[34]

Recent regulatory interventions—including the various stimulus and bailout programs and regulatory costs associated with the recent health care and financial reform legislation—have had dramatic economic impacts. Other long-known costs, such as indirect costs and the effects of lost innovation or productivity, are notoriously difficult to assess and can produce underestimates of the total regulatory burden (which works to the regulators' advantage).[35]

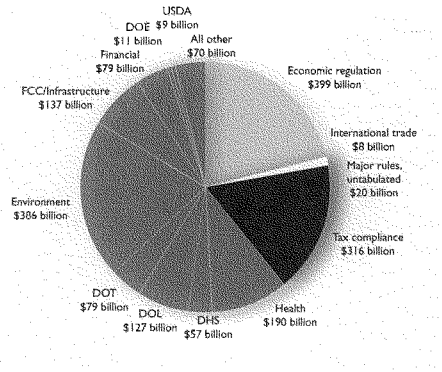
Per employee regulatory costs for firms of fewer than 50 workers can be 29 percent greater than those for larger firms.

Table 3. Regulatory Costs in Small, Medium, and Large Firms, 2012

	Cost per Employee for All Business Types			
	All Firms	< 50 Employees	50–99 Employees	> 100 Employees
All Federal Regs	$9,991	$11,724	$10,664	$9,083
Economic	$6,381	$5,662	$7,464	$6,728
Environmental	$1,889	$3,574	$1,338	$1,014
Tax Compliance	$960	$1,518	$1,053	$694
Occupational/Homeland Security	$761	$970	$809	$647

Source: W. Mark Crain and Nicole V. Crain, "The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business," National Association of Manufacturers, September 10, 2014.

Figure 1. Annual Cost of Federal Regulation and Intervention, 2015 Estimate, $1.882 Trillion



Source: Wayne Crews, *Tip of the Costberg: On the Invalidity of All Cost of Regulation Estimates and the Need to Compile Them Anyway*, Working Paper, 2015 ed., available at Social Science (SSRN) at http://ssrn.com/abstract=2502883 and at www.tenthousandcommandments.com.

Note: DHS = Department of Homeland Security; DOE = Department of Education; DOL = Department of Labor; DOT = Department of Transportation; FCC = Federal Communications Commission; USDA = U.S. Department of Agriculture.

Regulatory Compliance Costs: Catching Up to Government Spending?

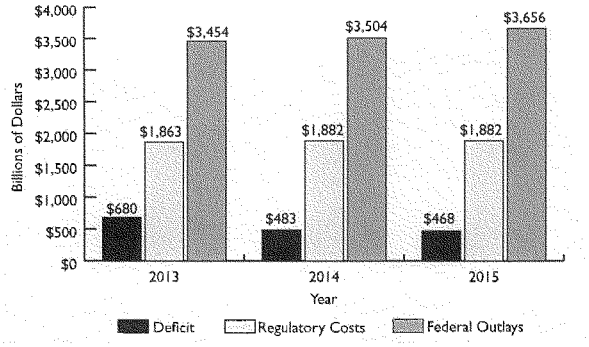
Regulatory compliance costs are equivalent to more than half the 2014 level of fiscal budget outlays.

FY 2014 saw a deficit of $483 billion on $3.5 trillion in outlays. Figure 2 compares deficits and outlays for 2013–2014 and projected amounts for 2015 with our 2015 regulatory cost estimate of $1.88 trillion. In the center bar, note that estimated regulatory compliance costs are equivalent to more than half the 2014 level of fiscal budget outlays. Regulatory compliance is nearly four times the 2014 deficit.

As the United States hovers at $3.5 trillion in annual federal spending today and a projected $4 trillion by 2017, the days when a $2 trillion federal budget was regarded as high seem to have passed in the blink of an eye. Contemplating off-budget regulatory compliance costs that are equivalent to half of all federal outlays is sobering enough, but the situation is more dramatic in Washington's high-spending culture of perpetual deficits. After nearly three decades of deficit spending, the federal government temporarily balanced the budget between 1998 and 2001.[36] But those days are history.

Regulations constitute a type of off-budget spending in the form of federal requirements that the population is compelled to bear. Thus, viewing outlays, regulation, and the deficit at one glance is useful (see Figure 2). FY 2014 saw a deficit of $483 billion on

Figure 2. Federal Outlays and Deficits Compared with Federal Regulatory Costs (2013, 2014, and projected 2015)



Sources: 2013 deficit and outlays from CBO, *The Budget and Economic Outlook: Fiscal Years 2014 to 2024*, February 2014, Table 1-2, "CBO's Baseline Budget Projections," p. 12, http://www.cbo.gov/sites/default/files/cbofiles/attachments/45010-Outlook2014_Feb.pdf. 2013-15 regulatory cost estimate from Crews, *Tip of the Costberg*. 2014 actual and 2015 projected deficit and outlays from CBO, *The Budget and Economic Outlook: Fiscal Years 2015 to 2025*, January 2015, Table 1-2, "CBO's Baseline Budget Projections," p. 13. https://www.cbo.gov/sites/default/files/cbofiles/attachments/49892-Outlook2015.pdf.

Note: Federal deficit and outlay numbers are by fiscal year; regulatory costs by calendar year.

$3.5 trillion in outlays, with no balance—let alone surplus—projected over the coming decade by the CBO. In fact, the smallest deficit projected is $468 billion in 2016, after which it heads northward again.[37]

Higher spending can translate into even higher future regulatory costs. Spending related to bailouts, stimulus, infrastructure, and the like will include significant regulatory components as well (for example, net neutrality proposals with respect to telecommunications infrastructure spending).

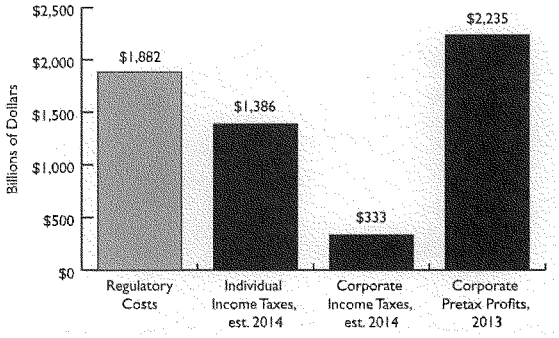
Interestingly, deficits totaling hundreds of billions of dollars and regulatory costs exceeding $1.8 trillion dwarf the initial $150 billion 2008 "stimulus package," which fizzled out and failed to resurrect the economy.[38] Policy makers would do well to consider economic liberalization and a reduced regulatory state as ways to address our spending and deficit culture and off-budget regulation.

Regulatory Costs versus Income Taxes and Corporate Profits

Regulatory costs now easily exceed the cost of individual income taxes and vastly exceed revenue from corporate taxes. As Figure 3 shows, regulatory costs now tower over the estimated 2014 individual income tax revenues of $1.386 trillion (individual income tax receipts had fallen substantially dur-

Regulatory costs now easily exceed the cost of individual income taxes and vastly exceed revenue from corporate taxes.

Figure 3. Regulatory Compliance Compared with Individual Income Taxes, Corporate Income Taxes, and Corporate Pretax Profits



Sources: Crews, *Tip of the Costberg*. Estimated 2014 tax figures from OMB, *Historical Tables*, Table 2.1, "Receipts by Source: 1934–2019," http://www.whitehouse.gov/omb/budget/Historicals. Corporate 2013 pretax profits (domestic and international) from Bureau of Economic Analysis, *National Income and Product Accounts Tables*, Table 6.17D, "Corporate Profits before Tax by Industry," http://www.bea.gov/iTable/iTable.cfm?ReqID=9&step=1#reqid=9&step=3&isuri=1&903=243.

ing the economic downturn but are rising again).[39] Corporate income taxes collected by the U.S. government, estimated at $333 billion in 2014, are dwarfed by regulatory costs (corporate tax receipts had declined by half during the recent downturn).[40] As the last bar of Figure 3 shows, regulatory compliance costs are approaching the level of pretax corporate profits, which were $2.235 trillion in 2013.[41] Incidentally, this is the second time pretax profits have topped $2 trillion.

Regulatory Costs versus GDP

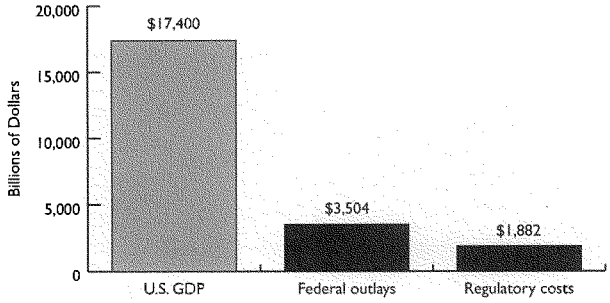
Regulation "Eats" 11 Percent of U.S. GDP

For the United Srates, the Commerce Department's Bureau of Economic Analysis in March 2015 estimated GDP for 2014 at $17.4 billion.[42] The rotal regulatory cost estimate of $1.88 trillion is equivalent to approximately 11 percent of that amount. Combining regulatory costs with federal FY 2014 outlays of $3.5 trillion (see Figure 2) indicates that the federal government's $5.386 trillion share of the economy reaches 30.9 percent. (See Figure 4.)

Costs of U.S. Regulation Compared to Some of the World's Largest Economies

U.S. regulatory costs surpass rhe 2013 GDP of both Canada, at $1.827 trillion, and Mexico, at $1.261 trillion.[43] Only eight countries have GDPs that exceed the estimated cost of regulation in the United States. If U.S. regulatory costs of $1.88 trillion were a country, it would be the world's tenth-largest economy, ranking behind Russia and ahead of India. Figure 5 depicts this number embedded

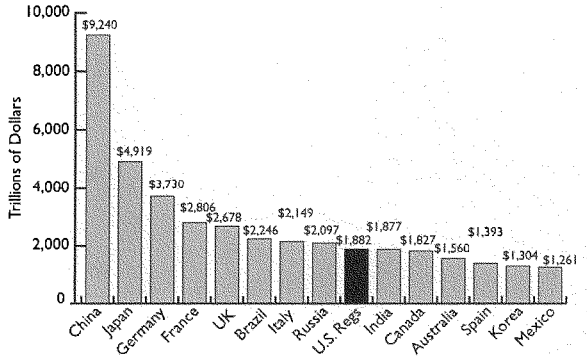
Figure 4. GDP Compared to Federal Outlays and Regulation



Sources: Wayne Crews, *Tip of the Costberg*. GDP from U.S. Department of Commerce, Bureau of Economic Analysis, *National Income and Product Accounts, Gross Domestic Product: Third Quarter 2014* (Third Estimate), February 28, 2014. https://www.bea.gov/newsreleases/national/gdp/gdpnewsrelease.htm. Outlays from CBO, *The Budget and Economic Outlook: Fiscal Years 2015 to 2025*, January 2015, Table 1-2, "CBO's Baseline Budget Projections," p. 13, http://www.cbo.gov/sites/default/files/cbofiles/attachments/45010-Outlook2014.pdf.

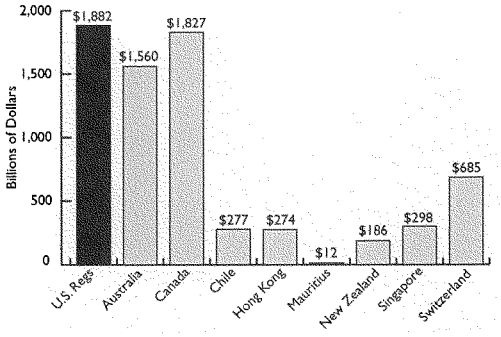
Note: Federal "share" of the economy 31 percent (outlays 20 percent, regulation 11 percent).

Figure 5. U.S. Regulatory Costs Compared to 2013 Gross Domestic Product of the World's Largest Economies after the United States



Source: Gross Domestic Product data from World Bank, Washington, D.C., GDP Data, http://data.worldbank.org/indicator/NY.GDP.MKTP.CD/countries.

Figure 6. U.S. Regulatory Load Compared to 2013 Gross Domestic Product in World Economies Regarded as Most Free



Sources: Crews, *Tip of the Costberg*. Gross Domestic Product data from World Bank, Washington, D.C., GDP Data, http://data.worldbank.org/indicator/NY.GDP.MKTP.CD/countries.

Note: "Free" economies consist of those in top ten of both the Heritage Foundation/*Wall Street Journal Index of Economic Freedom* and the Fraser Institute/Cato Institute *Economic Freedom of the World* report.

within a ranking of the 14 largest global economies (U.S. GDP is omitted in the chart).

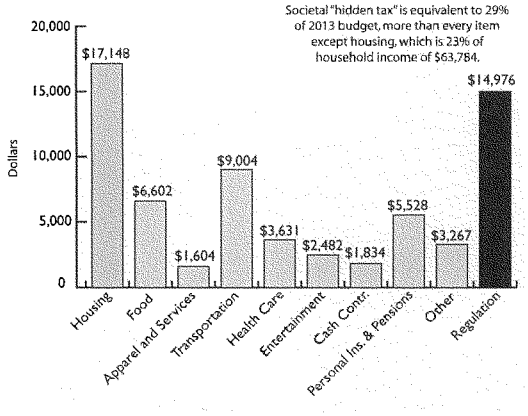
U.S. Regulatory Costs Exceed GDPs of All the World's Most-Free Economies

U.S. regulatory costs of $1.88 trillion exceed the output of many of the world's major economies, including those regarded as the most economically free. Two annual surveys of global economic freedom are widely cited. Each year, the Heritage Foundation and the *Wall Street Journal* jointly publish the *Index of Economic Freedom*.[44] Meanwhile, Canada's Fraser Institute, in conjunction with the Cato Institute and a large group of international think tanks, publishes the annual *Economic Freedom of the World* report.[45] Of the top 10 countries in these publications, eight are common to both. Figure 6 lists the eight compared to U.S. regulatory costs. Regulatory costs exceed the GDP of both Australia and Canada, the highest-income nations among the countries ranked most free. Note also that the United States no longer ranks in the top 10 of either report. Regulation is likely a factor affecting such rankings.

Regulation: A Hidden Tax on the Family Budget

Like the taxes they are required to pay, businesses will pass some regulatory costs on to consumers. Costs are borne by businesses, households, and lower-level governments both through direct pass-downs and

Figure 7. The U.S. Household Expense Budget of $51,100 Compared to Regulatory Costs



Sources: Bureau of Labor Statistics, author arithmetic.

Note: Proxy for households here is BLS depiction of 125,670,000 "Consumer units," which comprise "families, single persons living alone or sharing a household with others but who are financially independent, or two or more persons living together who share expenses."

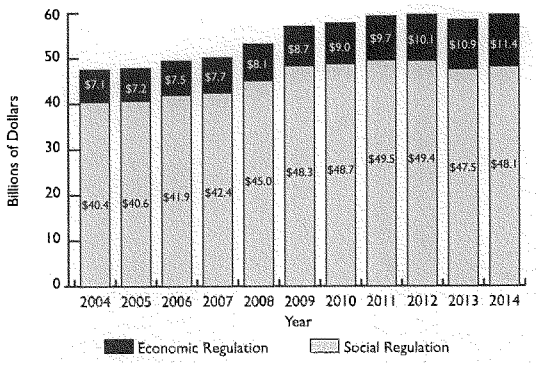
in broader indirect economic effects.[46] Thus, regulatory costs propagate through an economy, for which the basic unit remains the individual and the household. The implication is that regulation has large effects on societal wealth. For perspective, if we assume the full pass-through of all such costs to consumers, we can look at the share of each household's regulatory costs and compare it with total annual expenditures as compiled by the Labor Department's Bureau of Labor Statistics (BLS). This approach is a useful way of reflecting on the magnitude of regulatory costs.[47]

For America's 125.67 million households, or "consumer units" in BLS parlance, the average 2013 pretax income was $63,784.[48] Figure 7 breaks down household expenditures of $51,100 by category. The highest category is housing at $17,148 annually. The second-highest category is transportation at $9,004.

Regulatory costs obviously are not "paid" out of pocket by households. Nonetheless, if one envisioned these costs being allocated directly to individuals as done in Figure 7, U.S. households "pay" $14,976 annually in a hidden regulatory tax ($1.88 trillion in regulation divided by 125.67 million "consumer units"), or 23 percent of average income before taxes. That figure is higher than every annual household budgetary expenditure item except housing costs. More is "spent" on embedded or hidden regulation in society than on health care, food, transportation, entertainment, apparel and services, and savings. Societal regulatory costs amount to up to 29 percent of the typical household's expenditure budget.[49]

Societal regulatory costs amount to up to 29 percent of the typical household's expenditure budget.

Figure 8. Federal Agency Enforcement Budgets, $59.5 Billion Total in FY 2014



Source: Susan Dudley and Melinda Warren, "Economic Forms of Regulation on the Rise: An Analysis of the U.S. Budget for Fiscal Years 2014 and 2015," *Regulators' Budget* No. 36, published jointly by the Regulatory Studies Center at the George Washington University and the Weidenbaum Center on the Economy, Government, and Public Policy, July 2014, p. 25.

Note: Original 2009 constant dollars are adjusted here by the change in the consumer price index between 2009 and 2014, derived from Consumer Price Index tables, U.S. Department Of Labor, Bureau of Labor Statistics, Washington, D.C. (Table 24, All Urban Consumers (CPI-U), U.S. city average, all items), http://www.bls.gov/cpi/tables.htm.

The Federal Government's Costs of Policing the Regulatory State

Regulatory cost estimates encompass compliance costs paid by the public, but those estimates do not include administrative costs—the on-budget amounts spent by federal agencies to produce rules and police regulatory compliance. The Weidenbaum Center at Washington University in St. Louis, Missouri, and the Regulatory Studies Center at George Washington University in Washington, D.C., regularly examine the annual presidential federal budget proposal to compile the administrative costs of developing and enforcing rules. Such amounts are disclosed in the federal budget because these are funds that taxpayers contribute to support agencies' administrative budgets, not compliance costs paid by regulated parties.

The estimated FY 2014 enforcement costs incurred by federal departments and agencies stood at an estimated $59.5 billion, a slight 1.9 percent increase over $58.3 billion the previous year (Figure 8).[50]

Of that amount, $11.4 billion was spent administering economic regulations. The larger amount spent for writing and enforcing social and environmental regulations was $48.1 billion. In current dollars, the Environmental Protection Agency (EPA) alone spent an estimated $4.954 billion in this latter category in 2014, which accounted for 8.6 percent of the total expected to be spent

by all regulatory agencies.[51] The EPA formerly accounted for the lion's share of governmental administration and enforcement costs, but the Department of Homeland Security, at an estimated $23.6 billion, now accounts for 40.9 percent.[52]

The $59.5 billion in regulatory agency enforcement costs ($11.4 billion plus $48.1 billion) helps complete a picture of the federal regulatory apparatus. Adding administrative costs tabulated by the Weidenbaum Center and the Regulatory Studies Center to our $1.88 trillion estimate brings the total 2014 regulatory cost estimate to about $1.94 trillion.

Estimated full-time-equivalent administrative and enforcement staffing stood at 279,421 in FY 2014, up 2 percent from 273,843 the year before, according to the joint report by the Weidenbaum Center and Regulatory Studies Center. This represents an increase of more than 100,000 since the 2001 staffing of 173,027.[53] Much of the post-2001 surge may be attributable to the newly created Transportation Security Administration's hiring of thousands of airport screening personnel.

Thousands of Pages and Rules in the *Federal Register*

Despite these limitations, it remains worthwhile to track the Federal Register*'s growth according to its page counts, provided the caveats are kept in mind.*

The *Federal Register* is the daily depository of all proposed and final federal rules and regulations. The number of pages in the *Federal Register* is probably the most frequently cited measure of regulation's scope. There are obvious problems with relying on page counts. The wordiness of rules will vary, thus affecting the number of pages and obscuring the real effects of the underlying rules. A short rule could be costly and a lengthy one relatively cheap. Furthermore, the *Federal Register* contains administrative notices, corrections, rules relating to the governance of federal programs and budgetary operations, presidential statements, and other material. Blank pages sometimes appear—in previous decades, they numbered into the thousands, owing to the Government Publishing Office's imperfect prediction of the number of pages agencies would require.

Federal Register Pages

Despite these limitations, it remains worthwhile to track the *Federal Register*'s growth according to its page counts, provided the caveats are kept in mind. Tens of thousands of pages stream from America's departments, agencies, and commissions. As Figure 9 shows, at the end of 2014, the number of pages stood at 77,687. Although this number is President Obama's lowest level since the 68,598 pages of 2009, it is nonetheless the sixth-highest level in the history of the *Federal Register*. Both 2010 and 2011 had been the all-time record years, at 81,405 and 81,247, respectively. The 79,435 count in 2008 under President George W. Bush holds the third-highest title. Of the six all-time high *Federal Register* page counts, five have occurred during the Obama administration. (For a history of *Federal Register* page totals since 1936, see Appendix: Historical Tables, Part A.)

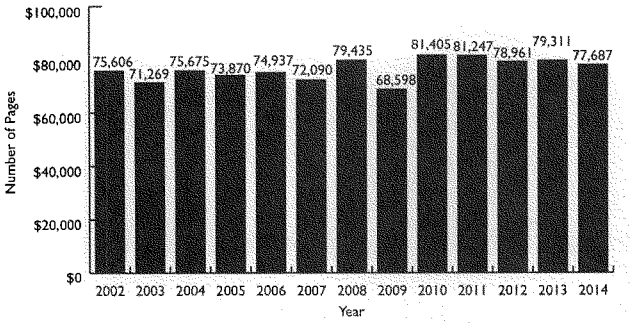
Federal Register Pages Devoted to Final Rules

Whereas they may plausibly signify greater governmental activity, gross page counts alone do not satisfactorily reveal whether actual regulatory burdens have increased or decreased, given that a rule of few pages might impose a significant burden. Isolating the pages devoted specifically to *final* rules might be more informative because it could omit pages devoted to proposed rules, agency notices, corrections, and presidential documents (although those categories have regulatory effects too). Between 2013 and 2014, the number of pages devoted to final rules dropped by 5.9 percent from a record high of 26,417 to 24,861 (see Figure 10).

The previous record was 26,320 in 2008, after which the number dropped sharply by 21 percent to 20,782 in 2009. This decrease mirrored the above-noted drop in total pages between those two years. Figure 10 shows that over the decade since 2005, the number of *Federal Register* pages devoted to final rules has increased by 7.9 percent.

Still another way of looking at *Federal Register* trends is hy pages per decade (see Figure 11). During the 1990s, the total number of *Federal Register* pages published was 622,368, whereas the total number published during the 1980s was 529,223. (The busiest year in

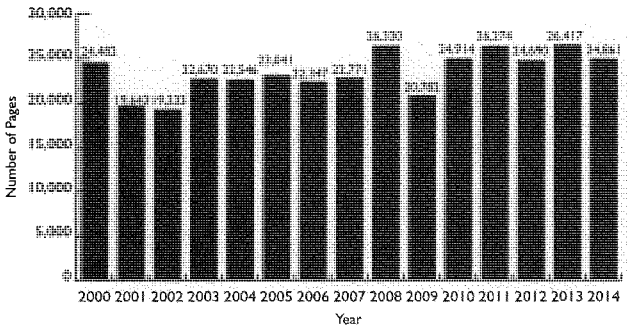
Figure 9. Number of *Federal Register* Pages, 2002–2014



Source: National Archives and Records Administration, Office of the Federal Register.

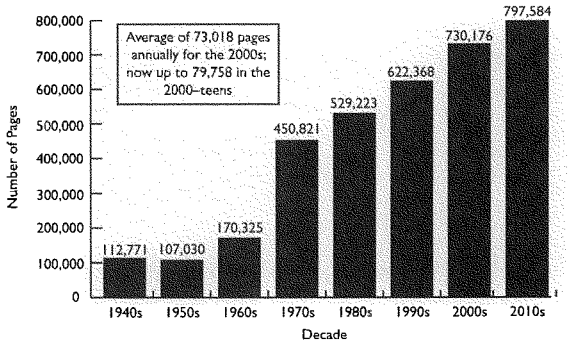
Note: Of six all-time-high *Federal Register* page counts, five belong to the Obama administration.

Figure 10. *Federal Register* Pages Devoted to Final Rules, 2000–2014



Source: National Archives and Records Administration, Office of the Federal Register.

Figure 11. *Federal Register* Pages per Decade ...
797,584 Pages Projected for the 2000 "Teens"



Source: National Archives and Records Administration, Office of the Federal Register.

Note: 2010s is a projection based on the last five years' average. Years 2000–2009 average 73,000 annual pages; this decade averages 79,000 pages yearly.

the 1980s was 1980, with a peak of 73,258 pages, as shown in Appendix: Historical Tables, Part A.) At the end of the first decade of the 21st century,[54] 730,176 pages ultimarely appeared—an average of 73,018 pages annually and a 17 percent increase over the 1990s.

If page counts hold around the current ranges, we can expect to see a considerable increase for the current decade. The last bar of Figure 11 projects the average of the past five years at 79,758. If trends continue, we will end up with nearly 800,000 *Federal Register* pages for the decade (the projection at the moment is 797,584). Decade page counts could top 1 million within a few years, as a glance at increases since the 1940s makes clear.

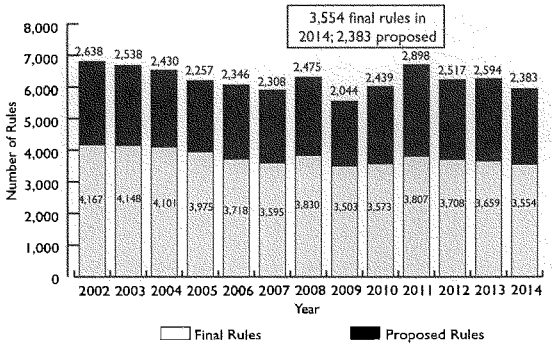
Number of Proposed and Final Rules in the *Federal Register*

The actual numbers of proposed and final *rules*—not just the page count—published in the *Federal Register* merit close attention. As Figure 12 shows, final rules in 2014 dropped by 2.9 percent, from 3,659 to 3,554. The upcoming section describing the Unified Agenda of federal regulations will examine some of the possible reasons for these recent declines.

Rule impacts vary of course, but the number of final rules currently being published is lower than it was throughout the 1990s, when the average number of annual regulations made final was 4,596, and it is lower than during the early years depicted in Figure 12. The average for the decade 2000–2009 was 3,945. So the decline in rule numbers is a positive trend, one that policy makers should seek to extend. Nonetheless, a pace of more than 3,500 completed rules annually is significant and creates a largely ignored cumulative burden.

Also notable is the pace of proposed rules appearing in the *Federal Register*. The 2,383 rules proposed in 2014 are down from the past few years. The 2,517 proposed rules of 2012 and

Figure 12. Number of Proposed and Final Rules in the *Federal Register*, 2002–2014



Source: National Archives and Records Administration, Office of the Federal Register.

the 2,898 proposed in 2011 were on the high side compared with the decade as a whole. Should the pace resume, high numbers of proposed rules signify likely future increases in final rules. (For the numbers of proposed and final rules and other documents issued in the *Federal Register* since 1976, see Appendix: Historical Tables, Part B.)

Cumulative Final Rules in the *Federal Register*

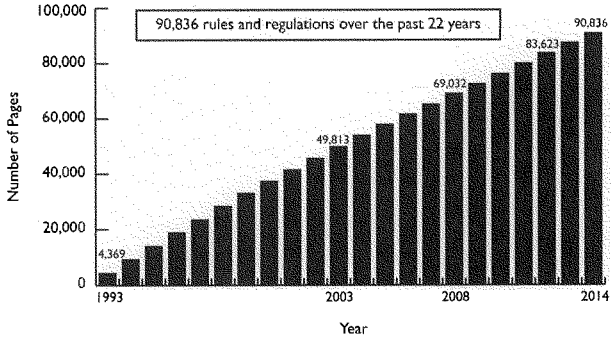
The cumulative effect of regulation can matter a great deal despite yearly fluctuations. The bottom line is that the annual outflow of more than 3,500 final rules—and often far more—has meant that about 90,836 rules have been issued since 1993, when the first edition of *Ten Thousand Commandments* was published (see Figure 13).

The Expanding *Code of Federal Regulations*

The page count for final general and permanent rules in the *Code of Federal Regulations* (CFR) is more modest than that of the *Federal Register*, but the count is substantial nonetheless. In 1960, the CFR contained 22,877 pages. Since 1975, the total pages in the complete CFR have grown from 71,224 to 175,268 at the end of 2014, including the 1,170-page index. That figure is a 146 percent increase over the period. The number of CFR volumes stands at 236, compared with 133 in 1975. Figure 14 depicts the CFR's pages for the past decade. (For the detailed breakdown numbers of pages and volumes in the CFR since 1975, see Appendix: Historical Tables, Part C.)

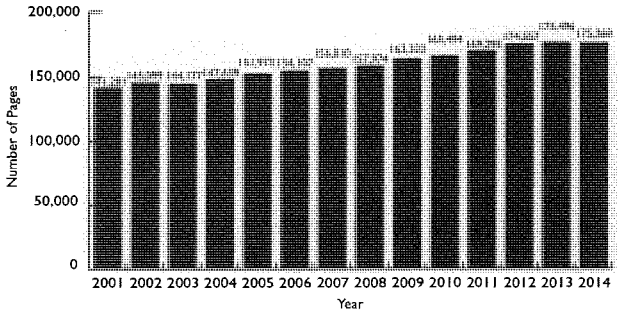
The annual outflow of more than 3,500 final rules—and often far more—has meant that about 90,836 rules have been issued since 1993, when the first edition of Ten Thousand Commandments *was published.*

Figure 13. Cumulative Final Rules Published in the *Federal Register*, 1993–2014



Source: National Archives and Records Administration, Office of the Federal Register.

Figure 14. *Code of Federal Regulations*, 175,268 Total Pages in 2014, 2001–2014



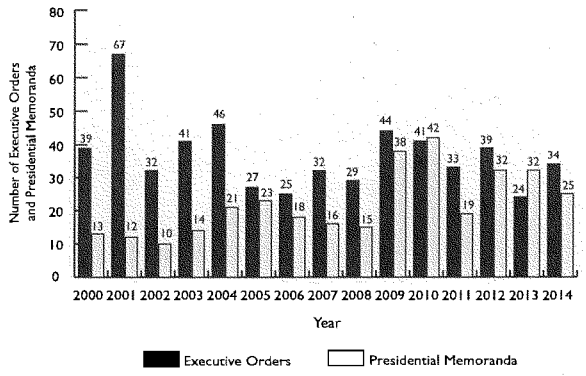
Source: National Archives and Records Administration, Office of the Federal Register.

Presidential Executive Orders and Executive Memoranda

During his 2014 State of the Union Address, President Obama pledged to use his "pen and phone" to implement a "year of action," with or without Congress.[55] Executive orders (as well as presidential memoranda[56] and other actions) make up a large component of that initiative. Here, we look at the numbers, but a considerable amount of executive branch activity is not well measured, and it merits attention, especially when an administration emphasizes unilateral action.

Executive orders' realm is ostensibly the internal workings and operations of the federal government. Subsequent presidents can overrurn them. Their use is nothing new, dating back to George Washington's administration.[57] Obama's totals are not high compared to those of other presidents. At the end of 2014, he had issued 215. Figure 15 lists executive orders issued over the past two decades, from 1995 to the present. Obama clearly issued more in his first term than did President George W. Bush in his second

Figure 15. Number of Executive Orders and Presidential Memoranda, 2000–2014



Source: National Archives and Records Administration, Office of the Federal Register.

term, but Bush was clearly in the lead during his first term.

Presidential memoranda since 1999—what *USA Today* has termed "Executive orders by another name"—are also depicted in Figure 15.[58] Memoranda may or may not be published, depending on the administration's own determination of "general applicability and legal effect," making it "difficult to count presidential memoranda."[59] Obama's pace since 2009 tops that of George W. Bush, which is unsurprising given rhe administration's openness about prioririzing executive action. Bush published 131 memoranda over his enrire presidency, whereas Obama during his first six years issued 188 that were published in the *Federal Register.* (President Bill Clinton published just 14 memoranda.[60])

We live in an era in which the government—without actually passing a law—increasingly asserts itself into various economic sectors, including health care, retirement, education, energy production, finance, land and resource management, funding of science and research, and manufacturing.

The pertinent question as far as regulatory burdens are concerned is what those executive orders and memoranda—and ones to come—are used for and what they do. Executive actions can liberalize and enhance freedom, such as President Abraham Lincoln's Emancipation Proclamation to free slaves. Or they can expand governmental power, such as President Harry Truman's failed attempr to seize control of America's steel mills[61] or President Franklin D. Roosevelt's confiscarion of the nation's gold.[62]

Whether lengthy or brief, orders and memoranda can have significant impacts for or against liberty. Thererfore, a smaller number of them does not necessarily mean small effects. In 2014 alone, Obama memoranda included creating a new financial investment instrument and implementing new positive rights regarding work hours and employment preferences.[63] As with the *Federal Register*, counts are interesting but do not tell the whole story.

Obama's own Executive Order No. 13563 about review and reform was a pledge to roll back regulation but amounted to only a few billion dollars in cuts that were swamped by other rules issued.[64] In all, four of Obama's executive orders directly address overregulation and rollbacks.[65]

Other key executive orders about regulatory restraint were President Bill Clinton's 1993 Executive Order No. 12866[66] and President Ronald Reagan's Executive Order No. 12291, which formalized central regulatory review at the OMB.[67] Clinton's was a step back from the heavier oversight of the Reagan order in that it sought "ro reaffirm the primacy of Federal agencies in the regulatory decision-making process."[68]

The United States existed for many decades before a president issued more rhan two dozen executive orders—that was President Franklin Pierce, who served in 1853–1857.[69] Orders numbered in the single digits or teens until President Lincoln and the subsequent reconstruction period. The Ulysses S. Grant administrarion issued 217, then a record.[70] From the 20th century onward, orders were to top 100 for each president and sometimes numbered in the thousands. President Franklin D. Roosevelt issued 3,467 numbered executive orders. Table 4 provides a look at executive order counts by administration since the nation's founding and presents a total rough count of 15,209.[71] (In an expansion of Figure 15, executive orders since 1995 by calendar year appear in Appendix: Historical Tables, Part J.)

We live in an era in which the government—without actually passing a law—increasingly asserrs itself into various economic sectors, including health care, retirement, education, energy production, finance, land and resource management, funding of science and research, and manufacturing. Decrees issued in a limited government context have different implications than do those issued in an era of activist government, and some of what transpires today is withour precedent. For example, the *Washington Post* described President Obama's unilateral executive acrion on immigrarion as "fl[ying] in the face of congressional intent—no matter how indefensible thar intent looks."[72] More disquieting is that Obama never signed such an order, and the Department of Homeland Securiry never published one in the *Federal Register.*[73] Meanwhile, the Inrernal Revenue Service has granted numerous waivers of the Patient Protection and

Table 4. Executive Orders by Administration

	Sequence Number		Total Number of Executive Orders
	Ending	Beginning	
George Washington	n/a		8
John Adams	n/a		1
Thomas Jefferson	n/a		4
James Madison	n/a		1
James Monroe	n/a		1
John Quincy Adams	n/a		3
Andrew Jackson	n/a		12
Martin van Buren	n/a		10
William Henry Harrison	n/a		0
John Tyler	n/a		17
James K. Polk	n/a		18
Zachary Taylor	n/a		5
Millard Fillmore	n/a		12
Franklin Pierce	n/a		35
James Buchanan	n/a		16
Abraham Lincoln	n/a		48
Andrew Johnson	n/a		79
Ulysses S. Grant	n/a		217
Rutherford B. Hayes	n/a		92
James Garfield	n/a		6
Chester Arthur	n/a		96
Grover Cleveland - I	n/a		113
Benjamin Harrison	n/a		143
Grover Cleveland - II	n/a		140
William McKinley	n/a		185
Theodore Roosevelt			1,081
William Howard Taft			724
Woodrow Wilson			1,803
Warren G. Harding			522
Calvin Coolidge			1,203
Herbert Hoover	6,070	5,075	996
Franklin D. Roosevelt	9,537	6,071	3,467
Harry S. Truman	10,431	9,538	894
Dwight D. Eisenhower	10,913	10,432	482
John F. Kennedy	11,127	10,914	214
Lyndon B. Johnson	11,451	11,128	324
Richard Nixon	11,797	11,452	346

(continued)

Table 4. Executive Orders by Administration *(continued)*

	Sequence Number		Total Number of Executive Orders
	Ending	Beginning	
Gerald R. Ford	11,966	11,798	169
Jimmy Carter	12,286	11,967	320
Ronald Reagan	12,667	12,287	381
George H.W. Bush	12,833	12,668	166
William J. Clinton	13,197	12,834	364
George W. Bush	13,488	13,198	291
Barack Obama	13,688	13,489	200
Total Number of Executive Orders			**15,209**

Source: W. Crews' tabulations; Executive Orders Disposition Tables Index, Office of the Federal Register, National Archives, http://www.archives.gov/federal-register/executive-orders/disposition.html; "Executive Orders," The American Presidency Project, ed. John T. Woolley and Gerhard Peters (Santa Barbara, CA: 1999–2014.), http://www.presidency.ucsb.edu/data/orders.php.

Note: n/a = not applicable or not available

Affordable Care Act's employer mandate without regard to the statute's language.[74]

Counting rules and regulations, executive orders, memoranda, and other regulatory guidance gets us only so far, yet these call for more scrutiny because they can be a way of working around the constitutional system of legislation by an elected body.[75]

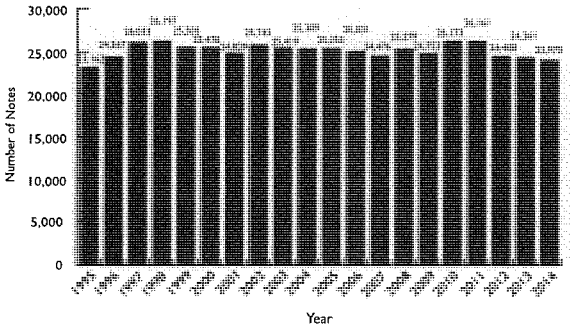
24,000 Public Notices Annually

Public notices in the *Federal Register* are non-rulemaking documents such as meeting and hearing notices and agency-related organizational material.[76] There are tens of thousands of yearly public notices, including memoranda, bulletins, guidance documents, and alerts, many of which could be important to the public. Figure 16 shows the number of notices annually. Whereas notices stood at 23,970 in 2014, the last time they had dipped below 24,000 was in 1995.

There were 46 notices that rose to the level of receiving OMB review during the 2014 calendar year (see Figure 17 in next section). Of these, five notices are deemed to have an "economically significant" impact. (A history of the number of notices reviewed annually appears in Appendix: Historical Tables, Part D.)

Policy makers should pay more attention to documents such as notices and memoranda because of the modern executive inclination to advance policy by memorandum and bulletin. Most notice-and-comment regulations already lack cost-benefit or other analysis. More unilateral executive action will make the costs of regulation even less clear as government grows and the federal government increasingly interposes itself in commerce and engages in private activity.

Figure 16. Thousands of "Public Notices" in the *Federal Register*, 1995–2014



Source: National Archives and Records Administration, Office of the Federal Register.

Analysis of the Regulatory Plan and Unified Agenda of Federal Regulations

What little regulatory disclosure does exist became more confused under the Obama administration. "The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions" (the Agenda) normally appears in the *Federal Register* each fall and, minus the Regulatory Plan, each spring. However, these days it seems even that has become too much to ask of a government that avoids preparing a comprehensive fiscal budget for itself, let alone a regulatory one.

In normal circumstances, the Agenda gives researchers a sense of the flow in the regulatory pipeline. It details rules recently completed, plus those anticipated within the upcoming 12 months by federal departments, agencies, and commissions (60 in the newest edition). As a cross-sectional snapshot of rules moving through the regulatory pipeline, the Agenda compiles agency-reported federal regulatory actions at several stages:

- Prerule actions
- Proposed and final rules
- Actions completed during the previous few months
- Anticipated longer-term rulemakings beyond a 12-month horizon

Therefore, the rules contained in the Agenda may often carry over at the same stage from one year to the next, or they may reappear in subsequent editions at different stages. The Agenda's rules primarily affect the private sector, but many also affect state and local governments and the federal government itself.

A complication is that agencies are not required to limit their regulatory activity to what they publish in the Agenda. As the *Federal Register* has noted:

> The Regulatory Plan and the Unified Agenda do not create a legal obligation on agencies to adhere to schedules in this publication or to confine their regulatory activities to those regulations that appear within it.[77]

The appearance of the Agenda has become less reliable. The fall 2011 edition did not appear until January 20, 2012.[78] The spring 2012 edition did not appear at all, and a solitary volume with no seasonal designation finally appeared the Friday before the Christmas 2012 holiday with no clarity on how its methodology might have been affected by the delay.

In spring 2013, a document titled "Spring 2013 Update to the Unified Agenda of Federal Regulatory and Deregulatory Actions" appeared instead of the normal Unified Agenda the day before July 4. Then in late 2013, echoing 2012's pre-Santa version, the fall edition appeared the day before Thanksgiving (coinciding with a delay of implementation of the Affordable Care Act's employer mandate, in defiance of the statute's language). In 2014, the fall edition again appeared late on the Friday before Thanksgiving.

Whereas rules finalized in the *Federal Register* remain more than 3,500 annually, the rules now being reported in the Unified Agenda are fewer, owing perhaps to the reporting irregularities noted earlier, the new guidance memoranda on the Agenda production, and the administration's own formal and informal rulemaking delays.

In 2012, spring and fall guidelines from the OMB's then-director of the Office of Information and Regulatory Affairs (OIRA), Cass Sunstein, altered directives to agencies regarding their Agenda reporting:[79]

> In recent years, a large number of Unified Agenda entries have been for regulatory actions for which no real activity is expected within the coming year. Many of these entries are listed as "Long-Term." Please consider terminating the listing of such entries until some action is likely to occur....
>
> Many entries are listed with projected dates that have simply been moved back year after year, with no action taken. Unless your agency realistically intends to take action in the next 12 months, you can remove these items from the Agenda.

Newly appointed OIRA Administrator Howard Shelanski issued a similar memorandum on the Unified Agenda on August 7, 2013—"please consider removing" became simply "please remove."[80] As Susan Dudley of the George Washington University Regulatory Studies Center notes, the changes introduced in the Sunstein and Shelanski memoranda might be beneficial, but "to the extent that reclassifying actions reduces the public's ability to understand upcoming regulatory activity, the revisions could reduce transparency and accountability."[81]

Upon release of the fall 2013 edition of the Agenda, regulatory expert Leland Beck noted the fluid nature of the Agendas, stating: "The [A]genda provides only a semi-filtered view of each agency's intentions and must be considered within its limitations" and the Agendas "reflect what the agency wants to make public, not necessarily all that they are actually considering, and some highly controversial issues may be withheld."[82]

Politics play a role in reporting and rule delays, and 2012 appeared to be an extreme case of delays ahead of an election. For example, a *Washington Post* headline proclaimed, "White House Delayed Enacting Rules Ahead of 2012 Election to Avoid Controversy." A former White House official told the *Post*, "As we entered the run-up to the election, the word went out the White House was not eager to review new rules." The *Post* summed up the matter as follows:

> 'The number and scope of delays under Obama went well beyond those of his predecessors, who helped shape rules but did not have the same formalized controls,' said current and former officials who spoke on the condition of anonymity because of the sensitivity of the topic.[83]

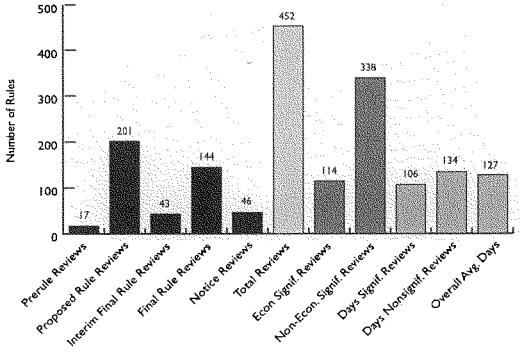
A December 2013 report by the Administrative Conference of the United States about the growing length of rule reviews at the OMB reinforced the *Washington Post* article's conclusion.[84] Other headlines captured the environment:

- "Politics Cited in Regulatory Delays," *The Hill*, December 15, 2013
- "Environmental Rules Delayed as White House Slows Rules," *New York Times*, June 12, 2013
- "White House Slowed Rules in Election Year, Study Says," Bloomberg News, December 15, 2013
- "[White House Press Secretary Jay] Carney Sidesteps on Whether Regs Were Delayed Before Election," *The Hill*, December 16, 2013

The 2014 mid-term elections did not appear to have as significant an impact on rule volume as the 2012 presidential cycle. However, completed rules in the Unified Agenda remain lower than during Obama's peak years.

Figure 17 presents the number of Executive Order No. 12866 rule reviews carried out at the OMB, by stage and by economic significance, for calendar year 2014. It also shows the number of days for review at the OMB in 2014, a process which now can take several months rather than two months or less. The Office of Information and Regulatory Affairs, however, does not review independent agen-

Figure 17. Number of OMB Rule Reviews under Executive Order 12866 and Average Days under Review, 2014



Source: Author search on RegInfo.gov,"Review Counts" database search engine under Regulatory Review heading.

cies' rules. (Appendix: Historical Tables, Part D, presents a detailed breakdown of numbers of rules reviewed by type and by average days for review from 1991 through 2014. Note the pre–Executive Order No. 12866 years depicted there, 1991–1993, when review times were shorter and the numbers of rules were considerably higher.)

Information about numbers of reviews and how long they take is well worth reporting for clarity and perspective. But whether reviewing a rule takes 120 days or 30 days may not make a great deal of difference in a regime where the OMB reviews only a few hundred of several thousand annual rules and cost-benefit analysis rarely occurs in the first place.

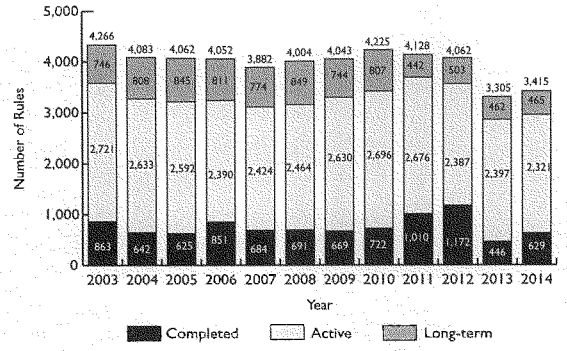
Some healthy skepticism may be justified regarding the numbers in the most recent Agenda, given the lack of both a clarification of the numbers' legitimacy and a rule delay by the administration. But like the *Federal Register*, they are what we have and can be improved.

3,415 Rules Acknowledged in the Unified Agenda Pipeline

The year-end 2014 Agenda finds federal agencies, departments, and commissions recognizing 3,415 regulations in the active (prerule, proposed, and final), just-completed, and long-rerm stages.[85] As is true every year, many of the rules are not new to the Agenda and have been in the pipeline for quite some time.

As Figure 18 shows, the overall Agenda pipeline had topped 4,000 rules from 2000 to 2014, except for the years 2007, 2013, and 2014, when the count dipped to 3,882, 3,305, and 3,415, respectively. The 2013 drop of 18.6 percent from 4,062 rules in 2012 may reflect the change in directive noted earlier. The all-time-high count for rules in the year-end Agenda was 5,119 in 1994. (For a history of the numbers of rules in the spring and fall Unified Agenda editions since 1983, see Appendix: Historical Tables, Part E.)[86]

Figure 18. Total Agency Rules in the Fall Unified Agenda Pipeline, 2003–2014



Source: Compiled by the author from "The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions," *Federal Register*, Fall edition, consecutive years, and database at reginfo.gov. "Active" rules consist of rules at the pre-rule, proposed and final stages.

Note: pre-2004 online database totals do not match the printed, paper editions of that era, so I have elected to retain the data as compiled in those earlier print editions.

President Obama declared during his 2012 State of the Union address that he had issued fewer rules in his first three years than did his predecessor, George W. Bush.[87] That statement was technically true with respect to the total number of *final* rules, but Obama's *proposed* rules have continued to mount (see Figure 12).

Obama's claim also held together somewhat regarding the overall number of rules in the Unified Agenda pipeline at that time (see Figure 18). But note that Obama referred to *first* terms, and he no longer makes the Bush comparisons. Although Obama did issue fewer rules in his first term than did Bush, Obama's first term brought more rules than Bush issued in his second term.

The *Federal Register* consistently shows some 3,500 rules made final annually. As Figure 18 shows, since 2003, "Active" rule counts have consistently remained above 2,300. This category stands at 2,321 for 2014. Although the Unified Agenda pipeline shows very large overall declines for 2013 and 2014, whether that translates into fewer actual regulations remains to be seen.

Note that although rules in the "Completed" category in fall Agendas (spring Agendas are not shown here) had been rising steadily and rapidly under Obama—from 669 in 2009 to 1,172 in 2012, a 75.2 percent increase—they too dropped precipitously to 462 in 2013. (Completed rules are "actions or reviews the agency has completed or withdrawn since publishing its last agenda.") This decline appears to have reflected the administration's rule delays featured in the previous section. However, this category is growing again; in 2014, rules rose to 629, a 36 percent increase.

Still, despite the drop in Obama's "Completed" rules in 2013, the average of his six years of fall Agendas, 777, exceeds the aver-

age of 726 for George W. Bush's final six years (bottom one-third of Figure 18).

With respect to the long-term category (top of Figure 18), in the wake of the Sunstein and Shelanski memoranda, one can see that the Obama administration discloses far fewer regulations compared to the previous administration. Announced long-term rules shown in Figure 18 dropped precipitously from 807 to 442 between 2010 and 2011. In the new 2014 Agenda, these rules stand at 465. De-emphasizing "long-term" reporting is unwise. In the "pen and phone" era, that is where much of the action will be, so having the notice is (or was) worthwhile.

The total pipeline count of 3,415 rules depicted in Figure 18 is broken out in Table 5 by agency, commission, or issuing department to show numbers of rules at the active, completed, and long-term stages by department or agency. Note that there are no completed or long-term rules lisred in the Regulatory Plan componenr of the Unified Agenda. (For the numbers of rules by department and agency from previous year-end editions of the Agenda since 1999, see Appendix: Historical Tahles, Part F.)

The overall Unified Agenda gives the impression that regulatory burdens are declining, bur that apparent decline may actually reflecr a pullback in disclosure and transparency, such as the administration's alleged delay of the pace of rules in 2012. Time will tell, as

Table 5. Unified Agenda Entries by Department and Agency, (Year-End 2014)

	Total Rules	Unified Agenda			Regulatory Plan Component		
		Active	Completed	Long Term	Active	Completed	Long Term
All Agencies	**3,415**	**2,321**	**629**	**465**	**159**		
Dept. of Agriculture	160	123	35	2	32		
Dept. of Commerce	270	165	85	20	5		
Dept. of Defense	121	98	23		5		
Dept. of Education	26	21	5		2		
Dept. of Energy	105	91	10	4	3		
Dept. of Health and Human Services	217	150	40	27	20		
Dept. of Homeland Security	141	78	17	46	22		
Dept. of Housing and Urban Development	55	38	15	2	1		
Dept. of the Interior	324	229	80	15			
Dept. of Justice	102	82	5	15	5		
Dept. of Labor	95	75	5	15	8		
Dept. of State	47	25	12	10			
Dept. of Transportation	216	158	33	25	17		
Dept. of Treasury	426	319	79	28			
Dept. of Veterans Affairs	75	56	17	2	1		
Environmental Protection Agency	186	129	31	26	23		

	Total Rules	Unified Agenda			Regulatory Plan Component		
		Active	Completed	Long Term	Active	Completed	Long Term
Advisory Council on Historic Preservation	1	1					
Agency for International Development	7	7					
Architectural and Transportation Barriers Compliance Board	7	5	1	1			
Commission on Civil Rights	1	1					
CPBSD*	2	1		1			
Commodity Futures Trading Commission	26	23	3				
Consumer Financial Protection Bureau	21	13	4	4			
Consumer Product Safety Commission	37	26	1	10			
Corporation for National and Community Service	6	3		3			
Court Services/Offender Supervision, D.C.	3			3			
Federal Acquisition Regulation	36	24	12				
Equal Employment Opportunity Commission	8	8			4		
Farm Credit Administration	26	23	3				
Federal Communications Commission	132	1	3	128			
Federal Deposit Insurance Corporation	25	17	6	2			
Federal Energy Regulatory Commission	24	1	6	17			
Federal Housing Finance Agency	19	16	1	2			
Federal Maritime Commission	7	4	3				
Federal Reserve System	23	16	7				
Federal Trade Commission	23	19	2	2			
General Services Administration	25	17	8				
Gulf Coast Ecosystem Restoration Council	4	3		1			
Institute of Museum and Library Services	1	1					
National Aeronautics and Space Administration	22	13	8	1			
National Archives and Records Administration	10	7	3				
National Credit Union Administration	22	20	2				

* Committee for Purchase from People Who Are Blind or Severely Disabled.

(continued)

Table 5. Unified Agenda Entries by Department and Agency, (Year-End 2012) *(continued)*

	Total Rules	Unified Agenda			Regulatory Plan Component		
		Active	Completed	Long Term	Active	Completed	Long Term
National Endowment for the Arts	8	8					
National Endowment for the Humanities	5	4	1				
National Indian Gaming Commission	5	4		1			
National Labor Relations Board	1			1			
National Science Foundation	3	1	2				
National Transportation Safety Board	14	13		1			
Nuclear Regulatory Commission	60	26	8	26	1		
Office of Government Ethics	6	6					
Office of Management and Budget	2	2					
Office of Personnel Management	67	31	36				
Peace Corps	4	3	1				
Pension Benefit Guaranty Corporation	12	5	3	4			
Postal Regulatory Commission	2		2				
Railroad Retirement Board	1	1					
Recovery Accountability and Transparency Board	3			3			
Securities and Exchange Commission	61	54	2	5			
Small Business Administration	30	26	3	1			
Social Security Administration	39	27	5	7	10		
Surface Transportation Board	8	3	1	4			
TOTAL	**3,415**	**2,321**	**629**	**465**	**159**	**0**	**0**

Source: Compiled from "The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions," *Federal Register*, Vol. 75, No. 243, December 20, 2010; and from online edition at www.reginfo.gov.

rules make their way from the Agenda to the *Federal Register*.

Top Five Executive Rulemaking Agencies

Every year, a relative handful of executive agencies accounts for a large number of the rules produced. The five departments and agencies listed in Table 6—the departments of the Treasury, Interior, Commerce, Health and Human Services, and Transporration—were the biggest rulemakers. These top five, with 1,453 rules among them, account for 43 percent of the 3,415 rules in the Agenda pipeline. For the second time, the Environmental Protection Agency does not appear in the top five; it is sixth. Including the EPA's 186 rules (there were 179 last year but 223 the year before) would bring the total to 1,639 rules, or 48 percent.

Table 6. Top Rule-Producing Executive and Independent Agencies
(From year-end 2014 Unified Agenda, total of active, completed, and long-term rules)

Executive Agency	Number of Rules
1. Department of the Treasury	426
2. Department of the Interior	324
3. Department of Commerce	270
4. Department of Health and Human Services	217
5. Department of Transportation	216
TOTAL	**1,453**
% of Total Agenda Pipeline of 3,415	**43**

Note: The Environmental Protection Agency, formerly always in the top five, is sixth, with 186 rules in the pipeline.

Independent Agency	Number of Rules
1. Federal Communications Commission	132
2. Office of Personnel Management	67
3. Securities and Exchange Commission	61
4. Nuclear Regulatory Commission	60
5. Social Security Administration	39
TOTAL	**359**
% of Total Agenda Pipeline of 3,415	**11**

Top 5 Executives plus Independents	**1,812**
% of Total Agenda Pipeline	**53**

Source: Compiled by the author from "The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions," *Federal Register*, Fall edition, and database at reginfo.gov.

Note: "Active" rules consist of rules at the prerule, proposed, and final stages.

Top Five Independent Rulemaking Agencies

Table 6 also depicts the top five independent agencies in the Agenda pipeline by rule count. They are the Federal Communications Commission, Office of Personnel Management, Securities and Exchange Commission, Nuclear Regulatory Commission, and Social Security Administration. Their total of 359 rules is 11 percent of the 3,415 rules in the Agenda. Combined, the top five executive and independent agency components come to 53 percent of that total.

Notable Regulations by Agency

Notable recent and pending regulations include the Department of Energy's drive to regulate energy-using devices ranging from dehumidifiers to vending machines to ice makers; the Department of Health and Human Services' regulation of labels on pet food, requirements for calorie count postings for vending machines and restaurants, and rules for school lunch contents; the Food and Drug Administration's portion size regulations for products such as breath mints; and the EPA's campaign against ordinary wood fires and, of course, fossil energy.

In recent Agenda editions, federal agencies have noted the initiatives listed below, among others, that are pending or recently completed. The full list of the 200 economically significant rules in the 2014 Agenda pipeline is available in Appendix: Historical Tables, Part G; economically significant rule tallies will be discussed in the next section. Many other rules are significant in fact, but do not get labeled as such by the government, including the Federal Communications Commission's net neutrality rules and proposals to require that quiet electric vehicles make noise.

Department of Agriculture

- Mandatory country-of-origin labeling of beef, fish, lamb, peanuts, and pork
- National school lunch and school breakfast programs: nutrition standards for all foods sold in school and certification of compliance with meal requirements for the national school lunch program (as required by the Healthy, Hunger-Free Kids Act of 2010)
- Rural Energy for America Program
- Rural broadband access loans and loan guarantees
- Mandatory inspection of catfish and catfish products
- Multifamily Housing Reinvention
- Inspection regulations for eggs and egg products
- Performance standards for ready-to-eat processed meat and poultry products
- "Modernization" of poultry slaughter inspection
- Regulations concerning importation of unmanufactured wood articles (solid-wood packing material)
- Bovine spongiform encephalopathy: minimal-risk regions and importation of commodities
- Nutrition labeling of single-ingredient and ground or chopped meat and poultry products

Department of Energy

- Energy-efficiency and conservation standards for the following: manufactured housing; automatic commercial ice makers; wine chillers; battery chargers and power supplies; televisions; residential dehumidifiers; computer servers and computers; walk-in coolers and freezers; residential furnace fans, boilers, and mobile home furnaces; electric distribution transformers; commercial refrigeration units and heat pumps; clothes washers and dryers; room air conditioners; portable air conditioners; dishwashers; pool heaters and direct heating equipment; fluorescent and incandescent lamps; metal halide lamp fixtures; small electric motors; refrigerated bottled or canned beverage vending machines; and residential central air conditioners and heat pumps
- Incentive program for manufacturing advanced technology vehicles

Department of Commerce

- Right whale ship strike reduction
- Taking of marine mammals incidental to conducting geological and geophysical exploration of mineral and energy resources on the outer continental shelf

Department of Education

- "Gainful Employment" rule to prepare students for employment in a recognized occupation
- Race to the Top

Department of Health and Human Services

- Substances prohibited from use in animal food or feed; registration of food and animal feed facilities

- Updated standards for labeling of pet food
- Revision of the Nutrition Facts and Supplement Facts labels: serving sizes of foods that can reasonably be consumed in one eating occasion, dual-column labeling, and modification of the reference amounts customarily consumed
- Produce safety regulation
- Sanitary transportation of human and animal food
- Patient Protection and Affordable Care Act; standards related to essential health benefits, actuarial value, and accreditation; and Medicaid, exchanges, and children's health insurance programs: eligibility, appeals, and other provisions
- Price regulation: prospective payment system rates for home health, acute, and long-term hospital care; skilled nursing facilities; inpatient rehabilitation facilities; and so on
- Nutrition labeling for food sold in vending machines and for restaurant menu items
- Food labeling: trans fatty acids in nutrition labeling, nutrient content claims, and health claims
- "Tobacco products" subject to the Federal Food, Drug, and Cosmetic Act, as amended by the Family Smoking Prevention and Tobacco Control Act
- Prevention of *Salmonella enteritidis* in shell eggs
- Good manufacturing practice in manufacturing, packing, or holding dietary ingredients and dietary supplements
- Good manufacturing practice regulations for finished pharmaceuticals
- Prior authorization process for certain durable medical equipment, prosthetic, orthotics, and supplies items
- Criteria for determining whether a drug is considered usually self-administered
- Requirements for long-term care facilities: hospice services
- Bar-code label requirements for human drug products and blood
- Pediatric dosing for various over-the-counter cough, cold, and allergy products
- Fire safety and sprinkler requirements for long-term care facilities

Department of Homeland Security

- Computer Assisted Passenger Prescreening System, providing government access to passenger reservation information
- Passenger screening using advanced imaging technology
- Importer security filing and additional carrier requirements
- Air cargo screening and inspection of towing vessels
- Minimum standards for driver's licenses and ID cards acceptable to federal agencies
- United States Visitor and Immigrant Status Indicator Technology program, which is authorized to collect biometric data from travelers and to expand to the 50 most highly trafficked land border ports

Department of the Interior

- Revised requirements for well plugging and platform decommissioning
- Increased safety measures for oil and gas operations on the Arctic outer continental shelf
- Blowout prevention for offshore oil and gas operations

Department of Justice

- Nondiscrimination on the basis of disability: accessibility of Web information, and services of state and local governments
- National standards to prevent, detect, and respond to prison rape
- Retail sales of scheduled listed chemical products

Department of Labor

- Conflict of interest rule in investment advice

- Group health plans and health insurance issuers relating to coverage of preventive services under the Patient Protection and Affordable Care Act
- Walking working surfaces and personal fall protection systems (slips, trips, and fall prevention)
- Establishing a minimum wage for contractors (Executive Order No. 13658)
- Application of the Fair Labor Standards Act to domestic service
- Improved fee disclosure for pension plans
- Occupational exposure to crystalline silica, tuberculosis, and beryllium
- Rules regarding confined spaces in construction: preventing suffocation and explosions
- Implementation of the health care access, portability, and renewability provisions of the Health Insurance Portability and Accountability Act of 1996
- Hearing conservation program for construction workers
- Reinforced concrete in construction
- Preventing backover injuries
- Cranes and derricks
- Health care standards for mothers and newborns
- Protective equipment in electric power transmission and distribution
- Refuge alternatives for underground coal mines
- Combustible dust
- Injury and illness prevention program

Department of Transportation

- Passenger car and light truck Corporate Average Fuel Economy standards (2017 model years and beyond)
- Fuel efficiency standards for medium- and heavy-duty vehicles and work rrucks
- Sound for hybrid and electric vehicles
- Motor coach seat belts
- Standard for rearview mirrors
- Commercial Driver's License Drug and Alcohol Clearinghouse
- Flight crew duty limirarions and rest requirements
- Automotive regulations for car lighting, door retention, brake hoses, daytime running-light glare, and side-impact protection
- Minimum training requirements for entry-level commercial motor vehicle operators and for operators and training instructors of multiple trailer combination trucks
- Hours of service, rest, and sleep for truck drivers; electronic logging devices and hours-of-service supporting documents
- Requirement for installarion of seat belts on motor coaches
- Heavy-vehicle speed limiters and electronic stability conrrol systems for heavy vehicles
- Amendments for positive train control systems
- Aging aircraft safety
- Upgrade of head restraints in vehicles
- Rear center lap and shoulder belt requirement
- Establishment of side impact performance requirements for child restraint systems
- Registration and training for operators of propane tank filling equipment
- Monitoring systems for improved tire safety and tire pressure
- Hazardous materials: transportation of lithium batteries

Environmental Protection Agency

- Control of air pollution from motor vehicles: Tier 3 motor vehicle emission and fuel standards
- Greenhouse gas emissions and fuel efficiency srandards for medium- and heavy-duty engines and vehicles
- Standards of Performance for New Residential Wood Hearers
- Clean air visibility, mercury, and ozone implementation rules
- Effluent limitations guidelines and standards for the steam electric power generating point source category

- Revision of stormwater regulations to address discharges from developed sites
- Formaldehyde emissions standards for composite wood products
- Review of National Ambient Air Quality Standards for lead, ozone, sulfur dioxide, particulate matter, and nitrogen dioxide
- Revision of underground storage tank regulations: revisions to existing requirements and new requirements for secondary containment and operator training
- Revision of new source performance standards for new residential wood heaters, new residential hydronic hearers, and forced-air furnaces
- Petroleum refineries—new source performance standards
- Rulemakings regarding lead-based paint and the Lead, Renovation, Repair, and Painting Program for public and commercial buildings
- National drinking water regulations covering groundwater and surface water
- National emission standards for hazardous air pollurants from plywood and composite wood products, certain reciprocating internal combustion engines, and auto paints
- Renewable fuels standards
- Standards for cooling water intake structures
- Combined rulemaking for industrial, commercial, and institutional boilers and process heaters
- Standards for management of coal combustion wastes ("coal ash") from electric power producers
- Control of emissions from non-road spark ignirion engines, new locomotives, and new marine diesel engines

Architectural and Transportation Barriers Compliance Board

- Americans with Disabilities Act accessibility guidelines for passenger vessels
- Information and communication technology standards and guidelines

Office of Personnel Management

- Multistate exchanges; implementations for Affordable Care Act provisions

Consumer Product Safety Commission

- Flammability standards for upholstered furniture and bedclothes
- Testing, cerrification, and labeling of certain consumer products
- Banning of certain backyard playsets
- Product registration cards for products intended for children

Federal Communications Commission

- Net neutrality order
- Broadband over power line systems
- Mobile personal sarellite communications
- Sarellite broadcasting signal carriage requirements
- Rules regarding Internet protocol-enabled devices

Department of Housing and Urban Development

- Revision of manufactured home construction and safety srandards regarding locarion of smoke alarms
- Regulation of Fannie Mae and Freddie Mac on housing goals
- Regulations within the Real Estate Settlement Procedures Act pertaining to mortgages and closing costs
- Refinement of income and rent determinations in public and assisted housing

Department of the Treasury

- Prohibirion of funding of unlawful Internet gambling
- Risk-based capital guidelines; capital adequacy guidelines

- Assessment of fees for large bank holding companies and other financial entities supervised by the Federal Reserve to fund the Financial Research Fund (which includes the Financial Stability Oversight Council)
- Troubled Asset Relief Program standards for compensation and corporate governance

Federal Deposit Insurance Corporotion

- Standardized Approach for Risk-Weighted Assets
- Margin and capital requirements for covered swap entities

Federal Energy Regulatory Commission

- Critical infrastructure protection reliability standards

Economically Significant Rules in the Agenda

A subset of the Agenda's 3,415 rules is classified as "economically significant," which means that agencies anticipate yearly economic impacts of at least $100 million. Those impacts generally amount to increased costs, although sometimes an economically significant rule is intended to reduce costs. As Table 7 shows, 200 economically significant rules from 24 separate departments and agencies appear at the active (prerule, proposed rule, and final rule), completed, and long-term stages.

The overall number of "economically significant" rules issued during the current administration is higher than at any time earlier in the decade. President George W. Bush started the uptick trend; President Obama continued it. The current administration is increasing the flow of costly, economically significant rules at the completed and active stages. As Figure 19 shows, 2014's 200 rules are a 5 percent increase over the past year's 191, but are by no means the highest level of the current administration. Still, the past two years' levels remain well above anything seen before 2010. Obama clearly retains a substantially higher flow of economically significant rules in the pipeline compared with that of the previous administration.

Recent online database editions of the Agenda break economically significant rules into completed, active, and long-term categories. Among the 200 rules, the body of active economically significant rules has not changed substantially under Obama's six years in office (they numbered 131 in both 2013 and 2014; his six-year average is 133), but they are clearly well above previous levels (the George W. Bush eight-year average is 87).

The smaller level of completed rules in the fall Unified Agenda from Obama's past two years might appear to conform with the earlier noted effort to dial back on regulations during 2012, which was reflected in fewer completed rules being issued in the Agenda overall (a peak of 57 in 2012 fell to 28 in 2013 and 31 in 2014).

Recall, however, that the Agenda appears in both the spring and the fall. Figure 20 isolates the totals of completed economically significant rules from both the spring and the fall Agendas for closer analysis of yearly trends in this category.

As Figure 20 shows, the annual totals for completed economically significant rules are down substantially from the 2010 peak of 81, but jumped to 69 from 51 during the past year. Nonetheless, apart from 2001, the level of completed economically significant rules from 2008 forward is notably higher. The average for Obama's six years so far is 68; George W. Bush's average over his eight years was 49. Only one edition of the Agenda appeared in 2012, which may complicate comparisons somewhat. (Also, some agency "midnight regulations" may have been issued by the Bush administration in 2009 as Obama was taking office,

Table 7. Economically Significant Rules in the Unified Agenda Pipeline
Expected to Have $100 Million Annual Economic Impact, Year-End 2014

	Rules	Active	Completed	Long Term
All Agencies	**200**	**131**	**31**	**38**
Dept. of Agriculture	14	9	4	1
Dept. of Commerce	1			1
Dept. of Defense	2	2		
Dept. of Education	6	4	2	
Dept. of Energy	18	18		
Dept. of Health and Human Services	64	39	17	8
Dept. of Homeland Security	16	9		7
Dept. of Housing and Urban Development	1	1		
Dept. of the Interior	4	3	1	
Dept. of Justice	4	4		
Dept. of Labor	14	8		6
Dept. of Transportation	14	11	1	2
Dept. of Treasury	8	3	2	3
Dept. of Veterans Affairs	4	3	1	
Environmental Protection Agency	12	10		2
Architectural and Transportation Barriers Compliance Board	2	2		
Federal Acquisition Regulation	1	1		
Consumer Product Safety Commission	1			1
Federal Communications Commission	7			7
Federal Deposit Insurance Corporation	1	1		
Federal Energy Regulatory Commission	1		1	
General Services Administration	1	1		
Nuclear Regulatory Commission	3	2	1	
Postal Regulatory Commission	1		1	
TOTAL	**200**	**131**	**31**	**38**

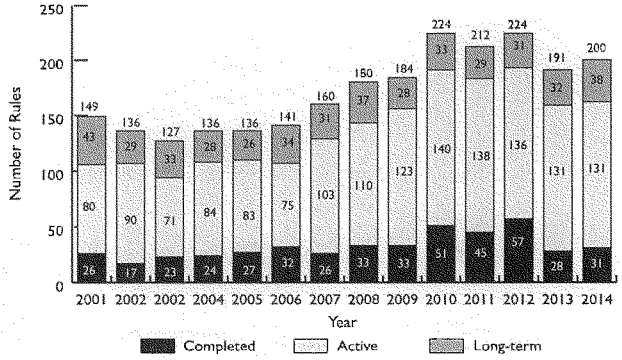
Source: Compiled from "The Regulatory Plan and the Unified Agenda of Federal Regulatory and Deregulatory Actions," *Federal Register*, and from online edition at www.reginfo.gov.

though the Obama administration did issue a freeze to review Bush rules upon assuming office).[88]

Each of the economically significant rules scattered among the 3,415 rules in the Agenda is estimated to have annual impacts of at least $100 million when implemented. So taken together, those rules might be expected to impose annual costs of at least $20 billion (200 rules multiplied by the $100 million economically significant threshold). Some rules, however, may decrease costs, which would offset this total. In any event, whatever the elusive actual total cost, it is a recurring annual cost to be added to previous years' costs cumulatively. And, as noted, agencies are not limited to what they list in the Agenda.

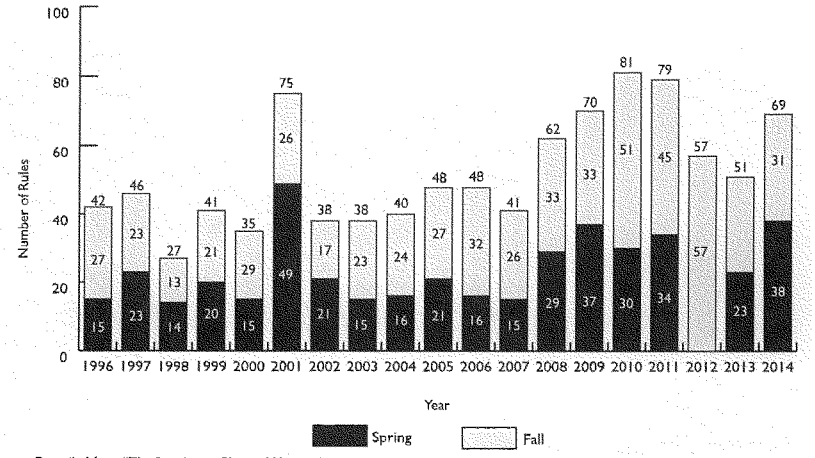
Paying the most attention to economically significant rules should not tempt policy

Figure 19. Economically Significant Rules in the Unified Agenda Pipeline, 2001–2014



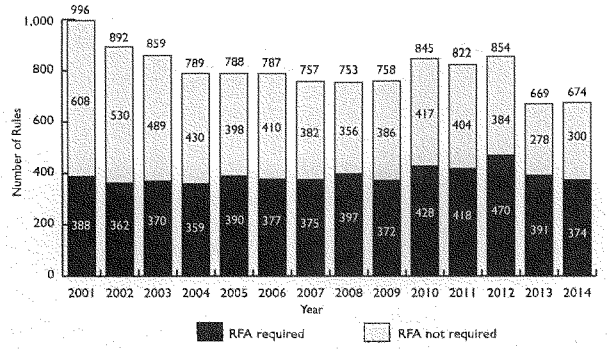
Source: Compiled from "The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions," *Federal Register*, Fall edition, various years.

Figure 20. Annual Completed Economically Significant Rules in the Unified Agenda, 1996–2014



Sources: Compiled from "The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions," *Federal Register*, Spring and Fall editions, various years.

Figure 21. Rules Affecting Small Business, 2001–2014



Sources: Compiled from "The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions," *Federal Register*, Fall edition, various years.

makers and analysts into ignoring the remaining bulk of rules in the yearly pipeline. In 2014, 3,215 federal rules were not designated as officially economically significant by the government (3,415 toral rules minus the 200 economically significanr ones). But that categorization does not mean that many of those rules are not economically significant in the ordinary sense of the term. A rule may cost up to $99 million and escape the official "economically significant" designation.

Federal Regulations Affecting Small Business

It is often said that there is no such thing as a free lunch, and that is especially true for the small businessperson. The "Small Business Anthem," heard on the *Small Business Advocate* radio program, goes in part:[89]

> Even though you make payroll every Friday,
> You don't have a guaranteed paycheck.
> You're a small business owner, and you eat what you kill.

The Regulatory Flexibility Act (RFA) directs federal agencies to assess their rules' effects on small businesses.[90] Figure 21 shows the number of rules requiring annual RFA analysis, as well as other rules that are anticipated by agencies to affect small business but do not require an annual RFA analysis. The number of rules acknowledged to significantly affect small business dropped substantially in 2013 and 2014. At the end of 2014, overall rules affecting small business stood at 674, the second-lowest level of the entire period shown in Figure 21, down from 854 in 2012. Before the 2013 drop—partly attributable to already noted changes in Unified Agenda reporting—the number of rules with small-business impacts during the Obama administration regularly exceeded 800, which had not been the case since 2003.

A rule may cost up to $99 million and escape the official "economically significant" designation.

Of those 674 rules in play with small-business impacts, 374 required an RFA, a 20.4 percent drop from the peak of 470 requiring an RFA

in 2012 (2012's 470 rules had been a 12.4 percent increase over 2011 and far above anything seen in the past decade). Another 300 rules were otherwise deemed by agencies to affect small business but not to rise to the level of requiring an RFA. In the past two years, disclosure of this category of rules appears to have diminished.

Table 8 breaks out the 2014 Agenda's 674 rules affecting small business by department, agency, and commission. Six of them—the departments of Agriculture, Commerce, Health and Human Services, Interior, and Transportation and the Federal Communications Commission—account for 443, or 66 percent, of the rules affecting small business.

Table 8. Unified Agenda Entries Affecting Small Business by Department, Agency, and Commission, Year-End 2014

		Number Affecting Small Business								
		RFA Required			RFA Not Required					
	Total Rules	Active	Completed	L-T	Active	Completed	L-T	Total	% Affecting Small Business	Top 6
Dept. of Agriculture	160	17	4		19	6	1	47	29.4	47
Dept. of Commerce	270	49	27	5	20	9	2	112	41.5	112
Dept. of Defense	121	1			6			7	5.8	
Dept. of Education	26		2					2	7.7	
Dept. of Energy	105	2	1		1			4	3.8	
Dept. of Health and Human Services	217	39	8	6	30	14	6	103	47.5	103
Dept. of Homeland Security	141	10		4	5	1	5	25	17.7	
Dept. of Housing and Urban Development	55							0	0.0	
Dept. of the Interior	324	6			18	4	2	30	9.3	30
Dept. of Justice	102		1		7		2	10	9.8	
Dept. of Labor	95	7		3	11	1	2	24	25.3	
Dept. of State	47				13		8	21	44.7	
Dept. of Transportation	216	14	2		26	4	7	53	24.5	53
Dept. of Treasury	426				21	6		27	6.3	
Dept. of Veterans Affairs	75				1			1	1.3	
Environmental Protection Agency	186	5		1				6	3.2	
Advisory Council on Historic Preservation	1									
Agency for International Development	7							0	0.0	
Architectural and Transportation Barriers Compliance Board	7	1						1	14.3	
Commission on Civil Rights	1							0	0.0	
CPBSD*	2							0	0.0	

* Committee for Purchase from People Who Are Blind or Severely Disabled.

	Total Rules	Number Affecting Small Business							% Affecting Small Business	Top 6
		RFA Required			RFA Not Required					
		Active	Completed	L-T	Active	Completed	L-T	Total		
Commodity Futures Trading Commission	26		1					1	3.8	
Consumer Financial Protection Bureau	21	2		1				3	14.3	
Consumer Product Safety Commission	37							0	0.0	
Corp. for National and Community Service	6							0	0.0	
Court Services/ Offender Supervision, D.C.	3							0	0.0	
Federal Acquisition Regulation	36	15	8			1		24	66.7	
Equal Employment Opportunity Commission	8				2			2	25.0	
Farm Credit Administration	26							0	0.0	
Federal Communications Commission	132	1	3	89			5	98	74.2	98
Federal Deposit Insurance Corporation	25							0	0.0	
Federal Energy Regulatory Commission	24							0	0.0	
Federal Housing Finance Agency	19							0	0.0	
Federal Maritime Commission	7				1			1	14.3	
Federal Reserve System	23	3	3		1			7	30.4	
Federal Trade Commission	23				17	2	2	21	91.3	
General Services Administration	25	3			1			4	16.0	
Gulf Coast Ecosystem Restoration Council	4									
Institute of Museum and Library Services	1							0	0.0	
National Aeronautics and Space Administration	22				1			1	4.5	
National Archives and Records Administration	10							0	0.0	
National Credit Union Administration	22							0	0.0	

(continued)

Table 8. Unified Agenda Entries Affecting Small Business by Department, Agency, and Commission, Year-End 2014 *(continued)*

	Total Rules	Number Affecting Small Business							% Affecting Small Business	Top 6
		RFA Required			RFA Not Required					
		Active	Completed	L-T	Active	Completed	L-T	Total		
National Endowment for the Arts	8				2			2	25.0	
National Endowment for the Humanities	5							0	0.0	
National Indian Gaming Commission	5							0	0.0	
National Labor Relations Board	1							0	0.0	
National Science Foundation	3							0	0.0	
National Transportation Safety Board	14									
Nuclear Regulatory Commission	60	1	1	1	1			4	6.7	
Office of Government Ethics	6							0	0.0	
Office of Management and Budget	2							0	0.0	
Office of Personnel Management	67							0	0.0	
Peace Corps	4							0	0.0	
Pension Benefit Guaranty Corporation	12							0	0.0	
Postal Regulatory Commission	2							0	0.0	
Privacy and Civil Liberties Oversight Board	0							0	0.0	
Railroad Retirement Board	1							0	0.0	
Recovery Accountability and Transparency Board	3							0	0.0	
Securities and Exchange Commission	61	5	1	1	2			9	14.8	
Small Business Administration	30	16	2	1	3	1		23	76.7	
Social Security Administration	39							0	0.0	
Surface Transportation Board	8		1					1	12.5	
TOTAL	**3,415**	**197**	**65**	**112**	**209**	**49**	**42**	**674**	**19.7**	**443**
			374			**300**				**66% of total**

Source: Compiled from "The Regulatory Plan and Unified Agenda of Federal Regulatory and Actions." Note: RFA = regulatory flexibility analysis; L-T = long term.

The overall proportion of total rules affecting small business, as noted in Table 8, stands at 19.7 percent, but the range is quite wide among agencies as the table shows. (For the numbers of rules affecting small business broken down by department and agency for fall Agendas since 1996, see Appendix: Historical Tables, Part H.)

For further perspective on the small-business regulatory climate, Box 1 depicts a partial list of the basic, non-sector-specific laws and regulations that affect small business.

Federal Regulations Affecting State and Local Governments

Ten Thousand Commandments primarily emphasizes regulations imposed on the private sector. However, state and local officials' realization during the 1990s that their own priorities were being overridden by federal mandates generated demands for reform. As a result, the Unfunded Mandates Act was passed in 1995, requiring lawmakers to pay closer attention to legislation's effect on states and localities.

Box 1. Federal Workplace Regulation Affecting Growing Businesses

Assumes nonunion, nongovernment contractor, with interstate operations and a basic employee benefits package. Includes general workforce-related regulation only. Omitted are (a) categories such as environmental and consumer product safety regulations and (b) regulations applying to specific types of businesses, such as mining, farming, trucking, or financial firms.

1 EMPLOYEE
- Fair Labor Standards Act (overtime and minimum wage [27 percent minimum wage increase since 1990])
- Social Security matching and deposits
- Medicare, Federal Insurance Contributions Act (FICA)
- Military Selective Service Act (allowing 90 days leave for reservists; rehiring of discharged veterans)
- Equal Pay Act (no sex discrimination in wages)
- Immigration Reform Act (eligibility must be documented)
- Federal Unemployment Tax Act (unemployment compensation)
- Employee Retirement Income Security Act (standards for pension and benefit plans)
- Occupational Safety and Health Act
- Polygraph Protection Act

4 EMPLOYEES: ALL THE ABOVE, PLUS
- Immigration Reform Act (no discrimination with regard to national origin, citizenship, or intention to obtain citizenship)

15 EMPLOYEES: ALL THE ABOVE, PLUS
- Civil Rights Act Title VII (no discrimination with regard to race, color, national origin, religion, or sex; pregnancy-related protections; record keeping)
- Americans with Disabilities Act (no discrimination, reasonable accommodations)

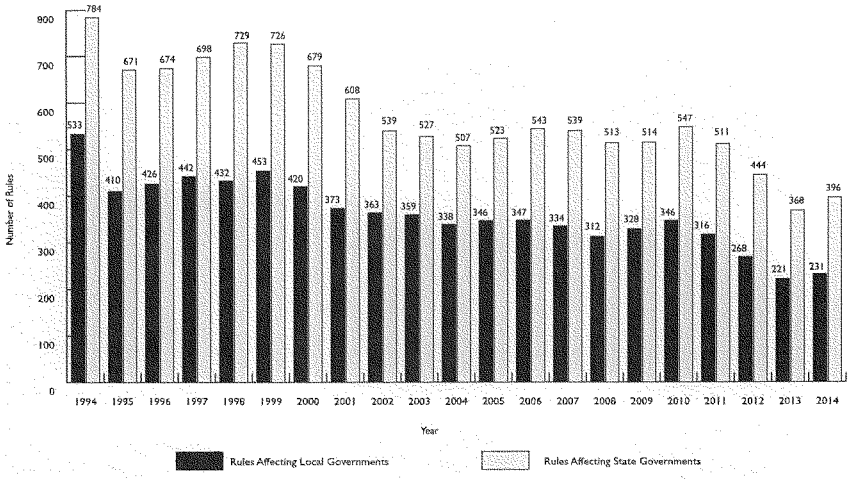
20 EMPLOYEES: ALL THE ABOVE, PLUS
- Age Discrimination Act (no discrimination on the basis of age against those 40 and older)
- Older Worker Benefit Protection Act (benefits for older workers must be commensurate with younger workers)
- Consolidation Omnibus Budget Reconciliation Act (COBRA) (continuation of medical benefits for up to 18 months upon termination)

25 EMPLOYEES: ALL THE ABOVE, PLUS
- Health Maintenance Organization Act (HMO Option required)
- Veterans' Reemployment Act (reemployment for persons returning from active, reserve, or National Guard duty)

50 EMPLOYEES: ALL THE ABOVE, PLUS
- Family and Medical Leave Act (12 weeks unpaid leave or care for newborn or ill family member)

100 EMPLOYEES: ALL THE ABOVE, PLUS
- Worker Adjusted and Retraining Notification Act (60-days written plant closing notice)—Civil Rights Act (annual EEO-1 form)

Figure 22. Rules Affecting State and Local Governments, 1994–2014



Sources: Compiled from "The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions," *Federal Register*, various years' editions; and from online edition at http://www.reginfo.gov.

As Figure 22 shows, agencies report that 231 of the 3,415 rules in the 2014 fall Agenda pipeline will affect local governments.[91] Since the passage of the Unfunded Mandates Act in the mid-1990s, the number of overall rules affecting local governments has fallen by 57 percent, from 533 to 231 (2013's 221 was the lowest level yet seen over this period).

Figure 22 also shows that the total number of regulatory actions affecting state governments stands at 396, an 8 percent increase from 368 in 2013. (For breakdowns of the numbers of rules affecting state and local governments by department and agency since 2006, see Appendix: Historical Tables, Part I. See earlier editions of this report for previous years.)

Government Accountability Office Database on Regulations

The various federal reports and databases on regulations serve different purposes:

- The *Federal Register* shows the aggregate number of proposed and final rules (both those that affect the private sector and those that deal with internal government machinery or programs).
- The Unified Agenda shows agency regulatory priorities and provides details about the overall number of rules at various stages in the regulatory pipeline, as well as those with economically significant effects and those affecting small business and state and local governments.

The 1996 Congressional Review Act (CRA) requires agencies to submit reports to Congress on their major rules—those costing $100 million or more. Owing to such reports, which are maintained in a database at the Government Accountability Office, one can more readily observe (a) which of the thousands of final rules that agencies issue each year are major and (b) which agencies are producing the rules.[92]

The CRA gives Congress a window of 60 legislative days in which to review a major rule and, if desired, pass a resolution of disapproval rejecting the rule. Despite the issuance of thousands of rules since the act's passage, including many dozens of major rules, only one has been rejected: the Department of Labor's rule on workplace repetitive-motion injuries in early 2001. According to a recent review, however, final rules are no longer properly submitted to the GAO and to Congress as required under the CRA.[93]

Table 9, derived from the GAO database of major rules, depicts the number of final major rule reports issued by the GAO regarding agency rules through 2014. There were 80 rules in 2014, 79 in 2013, and 67 in 2012.[94] The 100 rules in 2010 is the highest count since this tabulation began following passage of the CRA.

Mirroring what was seen as the most active executive and independent rulemaking agencies in Table 6 (see earlier), the Department of Health and Human Services, Bureau of Consumer Financial Protection, and Commodity Futures Trading Commission may be seen to be increasingly active in terms of major rules in wake of the Affordable Care Act and the Dodd-Frank financial regulation law. The Department of the Interior also maintains a relatively high flow of major rules.

President George W. Bush averaged 62 major rules annually during his eight years in office; President Obama's six years so far have averaged 81. Obama's major rule output level at this point is 31 percent higher than that of Bush. This parallels the depiction of economically significant rules in Figures 19 and 20. Despite declines in overall rule counts in the Unified Agenda, the Obama administration's output level of impact rules during the decade is notably higher.

A March 2014 Heritage Foundation analysis of the current administration's regulatory record isolated the major rules listed in the GAO database affecting only the private sector and distinguished between those that are deregulatory and those that are regulatory. This report found that 157 major rules adopted during the Obama administration have added almost $73 billion in annual costs.[95]

President George W. Bush averaged 62 major rules annually during his eight years in office; President Obama's six years so far have averaged 81.

Table 9. Government Accountability Office Reports on Major Rules as Required by the Congressional Review Act, 1998–2014

	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998
Architectural Barriers Compliance Board											1				1		
Bureau of Consumer Financial Protection		4	1	1													
Commodity Futures Trading Commission	1	4	9	6													
Consumer Product Safety Commission				1					1								
Department of Agriculture	8	4	2	4	6	12	3	7	8	6	7	4	7	9		6	5
Department of Commerce		2				2	1	2			1			2		5	1
Department of Defense	1				4	4	6			1			2	3		1	2
Department of Education	2	5	4	2	5	6	2	1	2							1	
Department of Energy	6	3	1	5	4	7	3	3				1	1	3	3		
Department of Health and Human Services	27	24	23	24	24	17	24	19	16	22	22	17	13	15	17	7	18
Department of Homeland Security	2	2	1	1	3	1	5	4	2	3	2	2					
Department of Housing and Urban Development				2	1	1	2			1	1			1	2	1	
Department of Justice			1	1	3				1	1	1		3	4			1
Department of Labor	3	3	3	2	6	1	2	3	3	1	1		2	3	5		2
Department of the Interior	6	6	7	6	7	7	10	5	6	6	8	7	7	8	9	6	7
Department of State			1		1		1										
Department of Transportation	3	3	2	2	5	6	8	3	1	3	5	4	6	3		4	1
Department of Treasury	6	3	2	1	4		1	1	1		1	1		1			1
Department of Veterans Affairs	3	1	1	2	2	2		1		1		2	1	3			
Emergency Oil and Gas Loan Board																1	
Emergency Steel Guarantee Loan Board																1	
Environmental Protection Agency	2	3	5	6	8	3	9	2	8	3	7	3	1	4	20	5	9
Equal Employment Opportunity Commission				1													
Federal Communications Commission	1	1					6	2	1	1	4	2	3	3	6	6	16
Federal Deposit Insurance Corporation	1	1															

Federal Election Commission																												
Federal Emergency Management Agency																												
Federal Reserve System	1	1		3	6	6	2							1			1				1							
Federal Trade Commission													1								1							
National Credit Union Administration																												1
National Labor Relations Board				1																								
Nuclear Regulatory Commission	1	3	1	1	1	2	1	2	1	1																		
Office of Management and Budget																												
Office of Personnel Management		1																										
Pension Benefit Guaranty Corporation	1																											1
Securities and Exchange Commission	5	5	3	8	9	7	7	5	3	4	2	5	2	2	5	3	8											
Small Business Administration											1			1	1		1											
Social Security Administration							2		2	1					1	3												
TOTAL	**Hand Tally (pre-2011)**					**99**	**84**	**95**	**60**	**56**	**56**	**66**	**51**	**51**	**70**	**77**	**51**	**76**											
	Published in the *Federal Register*	**80**	**79**	**67**	**80**	**100**	**83**	**94**	**61**	**55**	**56**	**65**	**50**	**50**	**69**	**76**	**51**	**76**										
	Received by GAO (database)	**79**	**79**	**67**	**81**	**105**	**79**	**90**	**65**	**52**	**57**	**63**	**53**	**50**	**70**	**75**	**49**	**78**										

Source: Chart compiled by Crews from GAO, 2011–14 agency detail and bottom two rows ("Published" and "Received") compiled from database at http://www.gao.gov/legal/congress.html. Pre-database detail before 2011 compiled by hand tally using GAO website.

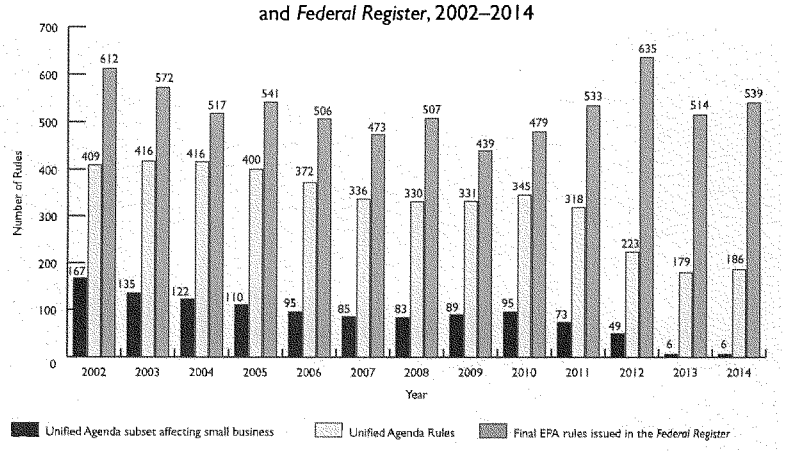
Case Studies

Regulation and the Environmental Protection Agency

It has been nearly five years since Rep. Darrell Issa (R-Calif.) issued a request to businesses, trade associations, and think tanks seeking input on which federal rules they considered to be the most burdensome. He received more than 160 responses filled with recommendations (including from the Competitive Enterprise Institute[96]), and his office issued a summary report.[97] The EPA, more than any other agency, accounted for the regulatory burden felt by private enterprise at the time.

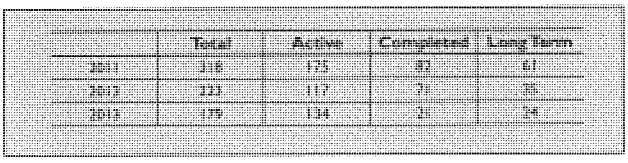
The number of EPA rules finalized in the *Federal Register* had been rising during the first term of the Obama administration, toward levels that had been seen before in the George W. Bush administration (see Figure 23). The Bush trend was downward, whereas Obama's counts rose sharply then decreased. Finalized EPA rules rose from 439 to 635 between 2009 and 2012—a 45 percent in-

Figure 23. Number of EPA Rules in the Unified Agenda and *Federal Register*, 2002–2014



Source: Compiled from "The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions," *Federal Register*, various years' editions; from online edition at www.reginfo.gov; and from FederalRegister.gov.

Box 2. Dropoff in Active, Completed, and Long-Term EPA Rules in the Unified Agenda



	Total	Active	Completed	Long Term
2011	318	173	87	61
2013	223	117	71	35
2015	179	134	21	24

crease—before dropping 19 percent to 514 in 2013. Between 2013 and 2014, the count rose again by 5 percent.

The past two years' drop is interesting, because for the third time, the EPA does not appear among the top five rulemaking agencies in the Unified Agenda pipeline (it is sixth with 186 rules; see Table 6). The agency also no longer ranks among the agencies with the most rules that are in the Unified Agenda and that affect small business (note, in Figure 23, the implausible 88 percent drop from 49 rules affecting small business in 2012 to only 6 in both 2013 and 2014). There also has been a substantial drop-off in the Agenda-listed EPA-issued rules over the past few years compared with the higher levels of EPA rules finalized in the *Federal Register* in Figure 23. In the past year, EPA rules in the Unified Agenda pipeline did rise a bit, from 179 to 186, but had otherwise been dropping since 2010, to 179 in 2013, which was the lowest level of the decade.

Where did all the EPA's Agenda rules go? Box 2 shows the 2013 breakdown of the agency's 179 Unified Agenda–listed rules by stage of completion. One can see that chunks of the EPA's active, completed, and long-term rules had simply vanished during the 2011–2013 interval. A falloff does not square with the level of regulatory impact driven by the EPA and has been partly addressed in earlier discussion of rule delays, as well as in the Sunstein and Shelanski memoranda and their possible effect on reporting policy for the Unified Agenda. It simply appears that fewer of the long-term rules are being disclosed. Recall too that only one Agenda, not the required two, appeared in 2012.

The EPA is not likely to roll back regulatory pursuits, as may he inferred from the Obama administration's public statements about acting on energy and environmental policy unilaterally. An October 2012 Senate Minority Report from Sen. James Inhofe (R-Okla.), tben-ranking member of the Senate Committee on Environment and Public Works, detailed what it called "Numerous Obama-EPA Rules Placed on Hold until After the Election."[98] Those rules include the following:

- Greenhouse gas regulations
- Ozone rule
- Hydraulic fraeruring rule
- Florida numeric nutrient criteria (water quality rules)
- Guidance documents for waters covered by the Clean Water Act
- Srormwarer regulation
- Tier 3 gas regulations
- Maximum achievable control technologies rules for industrial boilers and for cemenr
- Power plant cooling towers rule
- Coal ash rule
- Farm dust regulations
- Spill prevention control and countermeasure rule

Various years' editions of the OMB's *Report to Congress on the Benefits and Costs of Federal*

Regulations attest to the EPA's status as one of the more costly regulators. For example, the 2013 draft report had presented a range of total costs of $14.8 billion to $19.5 billion added during the fiscal year (for the handful of rules for which quantified cost-benefit analysis occurred). Well over half was attributable to the EPA: $8.3 billion to the EPA exclusively, and another $5.3 billion to $8.8 billion ascribed to the EPA and Department of Transportation's fuel economy standards.[99] This author's calculations yield an estimate of the annual impact of EPA rules at $386 billion.[100] That amount is less than the 2.4 percent of GDP that the EPA once anticipated its activities would encompass for programs existing in the 1990s and that it regarded as an investment bargain.[101]

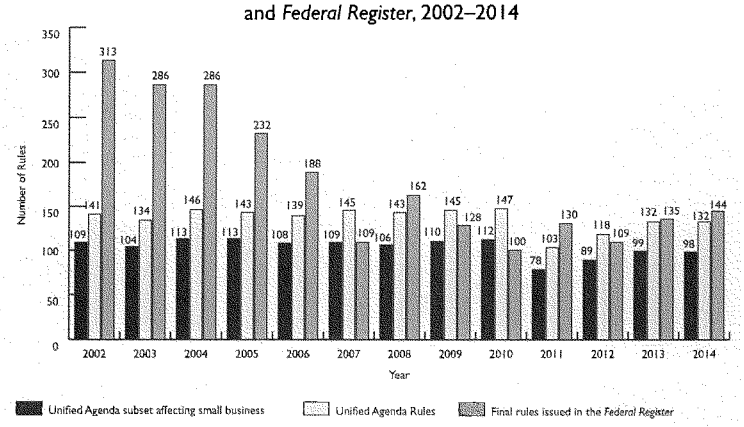
Regulation and the Federal Communications Commission

The Federal Communications Commission (FCC) is by no means the heavyweight among regulators as gauged by the number of rules issued. Its 132 rules in the Unified Agenda pipeline are surpassed by eight other departments or agencies (see Table 5), and its seven economically significant rules are exceeded by those of eight other agencies (see Table 7). Yet, the FCC is worth singling out for review because it wields great influence over a major economic sector regarded as a growth engine in today's information economy: telecommunications and the Internet.

The FCC is an expensive agency. It spent an estimated $433 million on regulatory development and enforcement during FY 2014[102] and accounts for more than $100 billion in annual regulatory and economic impact.[103] Figure 24 shows the FCC's final rules in the *Federal Register* during the past decade, its overall number of rules in the fall Unified Agenda, and its Agenda rules with small-business impacts.

According to the National Archives' online database, FCC final rules in the *Federal Reg-*

Figure 24. Number of FCC Rules in the Unified Agenda and *Federal Register*, 2002–2014



Source: Compiled from "The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions," Federal Register, various years' editions; from online edition at www.reginfo.gov; and from FederalRegister.gov.

Today's vibrant and robust communications markets are not fragile contrivances requiring fine-tuning by government bodies.

ister numbered as high as 313 in 2002, then declined steadily during the decade to a low of 109 in 2012. For the past two years, its number of final rules in the *Federal Register* bumped upward 32 percent between 2012 and 2014, from 109 to 144.[104] As of March 2, 2015, the FCC had finalized 19 rules in the *Federal Register*.

Of the 3,415 total rules in the 2014 fall Agenda pipeline, 132, or 4 percent, were in the works at the FCC (Figure 24). The commission's Agenda presence remained rather flat during the decade before dropping rapidly ro a low of 103 rules in 2011, but it has been rising since. Ninety-eight of the FCC's rules in the fall 2014 pipeline, or 74 percent of its total, affect small business, as Figure 24 and Table 8 show.

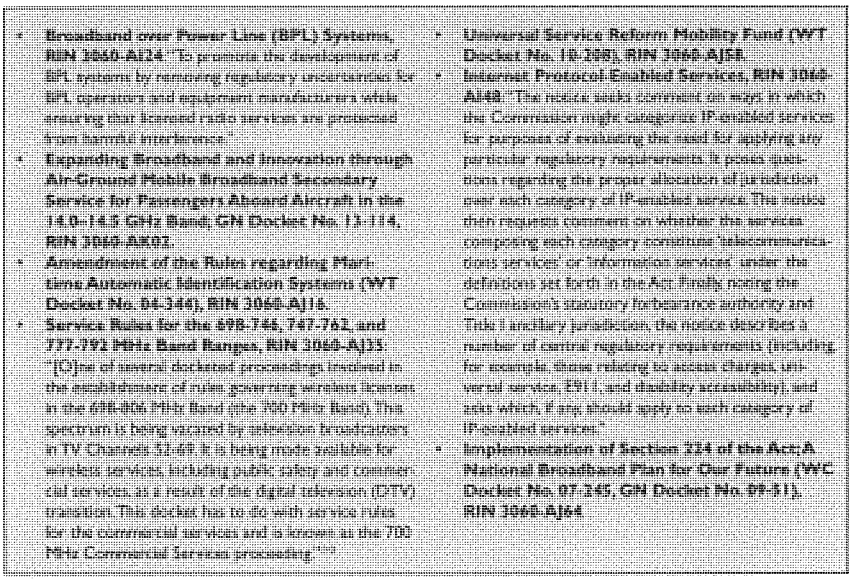
Although the FCC has published fewer rules in tbe Agenda and has finalized fewer than in preceding years, a pro-regulatory mindset still prevails at the commission, most recently seen in the February 2015 push to apply utility regulation to broadband in pursuit of so-called net neutrality.[105] Once again, an agency's rule count is not all that matters, because a handful of rules can have an outsized impact. Today's vibrant and robust communications markets are not fragile contrivances requiring fine-tuning by government bodies.[106] Communications markets do not exhibit abuses and market failures calling for top-down rulemaking with respect to every new technological advance. Yet the FCC forges ahead to expand its domain, in disregard of the outdated character of its original mandate to police public airwaves characterized by scarcity. Such conditions no longer apply in today's world, in which everyone is a potential broadcaster.

The FCC has continued the net neutrality push despite being rebuffed in federal court following earlier attempts and despite the concerns of many in Congress, which never delegated such authority to the commission.[107] Although a January 2014 federal court decision[108] struck down part of the FCC's open Internet order,[109] it exposed the Internet to even wider FCC regulation—and the commission has responded accordingly.[110] In recent years, the FCC has also inserted itself into journalism with a "Future of Media" proceeding.[111]

The FCC has held numerous hearings and workshops on those and other matters, including multicast must-carry regulation, media ownership restrictions, indecency, video game violence portrayal, and wireless net neutrality.

As noted, of the 200 economically significant rules in the works across the entire federal government, seven belong to the FCC (see Table 7) and are presented in Box 3. Such rulemakings, along with other FCC rules in the Agenda pipeline and the hundreds made final each year, present opportunities for either liberalization of telecommunications or avenues for new central regulatory oversight and protracted legal battles.[112] The commission has chosen the latter.

Box 3. Seven Economically Significant Rules in the Pipeline at the FCC



- **Broadband over Power Line (BPL) Systems, RIN 3060-AI24**: "To promote the development of BPL systems by removing regulatory uncertainties for BPL operators and equipment manufacturers while ensuring that licensed radio services are protected from harmful interference."
- **Expanding Broadband and Innovation through Air-Ground Mobile Broadband Secondary Service for Passengers Aboard Aircraft in the 14.0–14.5 GHz Band; GN Docket No. 13-114, RIN 3060-AK03.**
- **Amendment of the Rules regarding Maritime Automatic Identification Systems (WT Docket No. 04-344), RIN 3060-AJ16.**
- **Service Rules for the 698-746, 747-762, and 777-792 MHz Band Ranges, RIN 3060-AJ35**: "[O]ne of several docketed proceedings involved in the establishment of rules governing wireless licenses in the 698-806 MHz Band (the 700 MHz Band). This spectrum is being vacated by television broadcasters in TV Channels 52-69. It is being made available for wireless services, including public safety and commercial services, as a result of the digital television (DTV) transition. This docket has to do with service rules for the commercial services and is known as the 700 MHz Commercial Services proceeding."[1]
- **Universal Service Reform Mobility Fund (WT Docket No. 10-208), RIN 3060-AJ58.**
- **Internet Protocol Enabled Services, RIN 3060-AI49**: "The notice seeks comment on ways in which the Commission might categorize IP-enabled services for purposes of evaluating the need for applying any particular regulatory requirements. It poses questions regarding the proper allocation of jurisdiction over each category of IP-enabled service. The notice then requests comment on whether the services composing each category constitute 'telecommunications services' or 'information services' under the definitions set forth in the Act. Finally, noting the Commission's statutory forbearance authority and Title I ancillary jurisdiction, the notice describes a number of central regulatory requirements (including, for example, those relating to access charges, universal service, E911, and disability accessibility), and asks which, if any, should apply to each category of IP-enabled services."
- **Implementation of Section 224 of the Act; A National Broadband Plan for Our Future (WC Docket No. 07-245, GN Docket No. 09-51), RIN 3060-AJ64**

Liberate to Stimulate

The annual cost of regulation exceeds the ineffective $787 billion 2009 economic stimulus package. In contrast, a regulatory liberalization agenda would constitute genuine stimulus to the U.S. economy and offer some confidence and certainty for business enterprises that are seeking a greater foothold. Proposals like those described next can help achieve that goal.

Steps to Improve Regulatory Disclosure

Without more complete regulatory accounting, it is difficult to know whether society wins or loses as a result of rules.

Certainly some regulations' benefits exceed costs. But net benefits—or even actual costs—are known for very few. Without more complete regulatory accounting, it is difficult to know whether society wins or loses as a result of rules.[114]

Pertinent, relevant, and readily available regulatory data should be summarized and publicly reported to help create pressures for better disclosure. An incremental step would be for Congress to require—or for the OMB to initiate—publication of a summary of already available but scattered data. Such a regulatory transparency report card could resemble the presentation in *Ten Thousand Commandments*. That simple step alone would help transform today's regulatory hidden tax culture into one characterized by greater openness.

Congress needs to cease delegating legislative power to unelected agency personnel. Reining in off-budget regulatory costs can occur only when elected representatives assume responsibility and end "regulation without representation." Such a goal can be achieved by imposing institutional changes that would force Congress to internalize pressures that, in turn, would push it to make cost-benefit assessments *before* issuing directives to agencies.

Regulations fall into two broad classes: (a) those that are economically significant (costing more than $100 million annually) and (b) those that are not. Agencies typically emphasize reporting of economically significant or major rules, which the OMB also tends to emphasize in its annual assessments of the regulatory state. A problem with this approach is that many rules that technically come in below that threshold can still be very significant in the real-world sense of the term.

Moreover, agencies need not specify whether any or all of their economically significant or major rules cost only $100 million or far more than that. Instead, Congress could require agencies to break up their cost categories into tiers. Table 10 presents one alternative for assigning economically significant rules to one of five categories. Agencies could classify their rules on the basis of either (a) cost information that has been provided in the regulatory impact analyses that accompany many economically significant rules or (b) separate internal or external estimates. The Agenda and OMB reports could be made more user friendly by adopting these reforms.

Regulatory information is available, but it is often difficult or tedious to compile or interpret. To learn about regulatory trends and to accumulate information on rules, interested

Table 10. A Possible Breakdown of Economically Significant Rules

Category	Breakdown
1	> $100 million, < $500 million
2	> $500 million, < $1 billion
3	> $1 billion, < $5 billion
4	> $5 billion, < $10 billion
5	> $10 billion

citizens need either to comb through the Agenda's 1,000-plus pages of small, multi-column print or compile results from online searches and agencies' regulatory plans. Data from the Agenda could be made more accessible and user friendly if officially summarized in charts each year and presented as a section in the federal budget, in the Agenda itself, or in the *Economic Report of the President*.[115]

A regulatory transparency report card would reveal more clearly what we *do not* know about the regulatory state. Information could be added to the report as warranted—for instance, success or failure of special initiatives, such as "reinventing government" or regulatory reform efforts. Providing five-year historical data would prove useful to scholars, third-party researchers, and members of Congress. By making agency activity more explicit, a regulatory transparency report card would help ensure that policy makers take the growth of the regulatory state seriously. Recommended components for a regulatory transparency report card appear in Box 4.

Box 4. Regulatory Transparency Report Card, Recommended Official Summary Data by Program, Agency, and Grand Total, with Five-Year Historical Tables

- Tallies of economically significant rules and minor rules by department, agency and commission
- Numbers and percentages required/not required by statute or court order
- Numbers and percentages of rules affecting small business
- Depictions of how regulations accumulate as a small business grows
- Numbers and percentages of regulations that contain numerical cost estimates
- Tallies of existing cost estimates, including subtotals by agency and grand total
- Numbers and percentages lacking cost estimates, with a short explanation for the lack of cost estimates
- Analysis of the *Federal Register*, including number of pages and proposed and final rule breakdowns by agency
- Number of major rules reported on by the Government Accountability Office in its database of reports on regulations
- Ranking of most active rulemaking agencies
- Identification of rules that are deregulatory rather than regulatory
- Rules that affect internal agency procedures alone
- Number of rules new to the Unified Agenda, number that are carry-overs from previous years
- Numbers and percentages of rules facing statutory or judicial deadlines that limit executive branch ability to restrain them
- Rules for which weighing costs and benefits is statutorily prohibited
- Percentages of rules reviewed by the OMB and action taken

Ending Regulation without Representation: The Unconstitutionality Index—16 Rules for Every Law

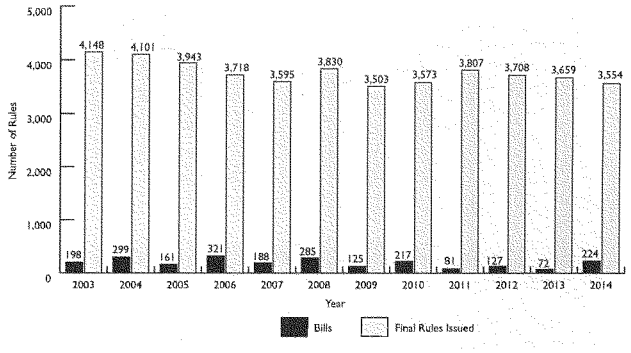
Agencies do not answer to voters. Yet in a sense, regulators and the administration, rather than Congress, do the bulk of U.S. lawmaking. Years of unbudgeted growth of the federal regulatory system are worrisome when no one can claim with assurance that regulatory benefits exceed costs. But agencies are not the only culprits. For too long, Congress has shirked its constitutional duty to make the tough calls. Instead, it delegates substantial lawmaking power to agencies and then fails to ensure that they deliver benefits that exceed costs.[116] Thus, agencies can hardly be the only ones faulted for suboptimal or damaging regulation or for not ensuring that only good rules get through.

Agencies face significant incentives to expand their turf by regulating even without demonstrated need. The primary measure of agency productivity—other than growth in their budgets and number of employees—is the body of regulation they produce.[117] One need not deplete too much time and energy blaming agencies for carrying out the very regulating they were set up to do in the first place. Better to point a finger at Congress.

For perspective, consider that regulatory agencies issued 3,554 final rules, whereas the 113th Congress passed and President Obama signed into law a comparatively few 224 bills in calendar year 2014 (up from 72 in 2013).[118]

Figure 25 presents the "Unconstitutionality Index," the multiple of rules issued over the number of public laws by calendar year passed since 2003. There were 16 rules for

Figure 25. The 2014 Unconstitutionality Index, 2003–2014



Source: Federal Register data from National Archives and Records Administration and from Crews tabulation at www.tenthousandcommandments.com. Public Laws data compiled from Government Printing Office, Public and Private Laws at http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=PLAW; and from National Archives, Previous Sessions: Public Law Numbers at http://www.archives.gov/federal-register/laws/past/index.html.

every law in 2014. In 2013, there were 51 times as many rules as laws. The ratio can vary widely, but the average over the decade has been 26 rules for every law. Rules issued by agencies are not usually substantively related to the current year's laws; typically, agencies administer earlier legislation. Still, this perspective is a useful way of depicting flows and relative workloads.

If the thousands of notices and dozens—sometimes hundreds—of executive orders issued annually are considered, policy making without representation assumes greater importance as an issue of concern. Historical Tables Part J depicts the Unconstitutionality Index dating back to 1995 and shows just by way of comparison the numbers of executive orders and the numbers of notices (within which executive orders are embedded).

An annual regulatory transparency report card is worthwhile and needed but not the complete answer. Regulatory reforms that rely on agencies policing themselves will not rein in the regulatory state or address regulation without representation. Rather, making Congress directly answerable to voters for the costs that agencies impose on the public would best promote accountable regulation. Congress should vote on agencies' final rules before such rules become binding on the public.

Increasing congressional accountability for regulatory costs should be a priority in today's era of debt and deficits. Concern about mounting national debt invites Congress to regulate rather than to increase government spending to accomplish policy ends. Suppose Congress wanted to create a job-training program. Funding the program would require approval of a new appropriation for the Department of Labor, which would appear in the federal budget and would increase the deficit. Instead, Congress could pass a law requiring Fortune 500 companies to fund job training, which would be carried out through new regulations issued by the Department of Labor. The latter option would add little to federal spending but would still let Congress take credit for the program. By regulating instead of spending, government can expand almost indefinitely without explicitly taxing anybody one extra penny.

Affirmation of new major regulations would ensure that Congress bore direct responsibility for every dollar of new regulatory costs; it is a prerequisite for controlling the off-budget regulatory state. The Regulations from the Executive In Need of Scrutiny Act (REINS) Act (H.R. 427, S. 226), sponsored by Rep. Todd Young (R-Ind.) and Sen. Rand Paul (R-Ky.), offers one such approach.[119] The REINS Act would require Congress to vote on all economically significant agency regulations—those with estimated annual costs of $100 million or more. It has passed the House in the two previous congressional sessions but has not moved forward in the Senate. The current REINS legislation was marked up in the House Judiciary Committee, fittingly, on April 15, 2015.[120]

By regulating instead of spending, government can expand almost indefinitely without explicitly taxing anybody one extra penny.

To avoid getting bogged down in approving myriad agency rules, Congress could vote on agency regulations in bundles. Another way to expedite the process is by allowing congressional approval or disapproval of new regulations to be given by voice vote, rather than by tabulated roll call vote. What matters is that Congress go on record for what laws the public must heed.

Congressional rather than agency approval of regulations and regulatory costs should be the goal of reform. When Congress ensures transparency and disclosure and finally assumes responsibility for the growth of the regulatory state, the resulting system will be one that is fairer and more accountable to voters.

Appendix: Historical Tables

Part A. *Federal Register* Page History, 1936–2014

Year	Unadjusted Page Count	Jumps/Blanks	Adjusted Page Count
1936	2,620	n/a	2,620
1937	3,450	n/a	3,450
1938	3,194	n/a	3,194
1939	5,007	n/a	5,007
1940	5,307	n/a	5,307
1941	6,877	n/a	6,877
1942	11,134	n/a	11,134
1943	17,553	n/a	17,553
1944	15,194	n/a	15,194
1945	15,508	n/a	15,508
1946	14,736	n/a	14,736
1947	8,902	n/a	8,902
1948	9,608	n/a	9,608
1949	7,952	n/a	7,952
1950	9,562	n/a	9,562
1951	13,175	n/a	13,175
1952	11,896	n/a	11,896
1953	8,912	n/a	8,912
1954	9,910	n/a	9,910
1955	10,196	n/a	10,196
1956	10,528	n/a	10,528
1957	11,156	n/a	11,156
1958	10,579	n/a	10,579
1959	11,116	n/a	11,116
1960	14,479	n/a	14,479
1961	12,792	n/a	12,792
1962	13,226	n/a	13,226
1963	14,842	n/a	14,842
1964	19,304	n/a	19,304
1965	17,206	n/a	17,206
1966	16,850	n/a	16,850
1967	21,088	n/a	21,088

Year	Unadjusted Page Count	Jumps/Blanks	Adjusted Page Count
1968	20,072	n/a	20,072
1969	20,466	n/a	20,466
1970	20,036	n/a	20,036
1971	25,447	n/a	25,447
1972	28,924	n/a	28,924
1973	35,592	n/a	35,592
1974	45,422	n/a	45,422
1975	60,221	n/a	60,221
1976	57,072	6,567	50,505
1977	65,603	7,816	57,787
1978	61,261	5,565	55,696
1979	77,498	6,307	71,191
1980	87,012	13,754	73,258
1981	63,554	5,818	57,736
1982	58,494	5,390	53,104
1983	57,704	4,686	53,018
1984	50,998	2,355	48,643
1985	53,480	2,978	50,502
1986	47,418	2,606	44,812
1987	49,654	2,621	47,033
1988	53,376	2,760	50,616
1989	53,842	3,341	50,501
1990	53,620	3,825	49,795
1991	67,716	9,743	57,973
1992	62,928	5,925	57,003
1993	69,688	8,522	61,166
1994	68,108	3,194	64,914
1995	67,518	4,873	62,645
1996	69,368	4,777	64,591
1997	68,530	3,981	64,549
1998	72,356	3,785	68,571
1999	73,880	2,719	71,161
2000	83,294	9,036	74,258
2001	67,702	3,264	64,438
2002	80,332	4,726	75,606
2003	75,798	4,529	71,269
2004	78,852	3,177	75,675
2005	77,777	3,907	73,870
2006	78,724	3,787	74,937
2007	74,408	2,318	72,090
2008	80,700	1,265	79,435
2009	69,644	1,046	68,598
2010	82,480	1,075	81,405
2011	82,415	1,168	81,247
2012	80,050	1,089	78,961
2013	80,462	1,151	79,311
2014	**78,796**	**1,109**	**77,687**

Source: National Archives and Records Administration, Office of the Federal Register.
Note: Publication of proposed rules was not required before the Administrative Procedures Act of 1946. Preambles to rules were published only to a limited extent before the 1970s.
n/a = not available.

Part B. Number of Documents in the *Federal Register*, 1976–2014

Year	Final Rules	Proposed Rules	Other*	Total
1976	7,401	3,875	27,223	38,499
1977	7,031	4,188	28,381	39,600
1978	7,001	4,550	28,705	40,256
1979	7,611	5,824	29,211	42,646
1980	7,745	5,347	33,670	46,762
1981	6,481	3,862	30,090	40,433
1982	6,288	3,729	28,621	38,638
1983	6,049	3,907	27,580	37,536
1984	5,154	3,350	26,047	34,551
1985	4,843	3,381	22,833	31,057
1986	4,589	3,185	21,546	29,320
1987	4,581	3,423	22,052	30,056
1988	4,697	3,240	22,047	29,984
1989	4,714	3,194	22,218	30,126
1990	4,334	3,041	22,999	30,374
1991	4,416	3,099	23,427	30,942
1992	4,155	3,170	24,063	31,388
1993	4,369	3,207	24,017	31,593
1994	4,867	3,372	23,669	31,908
1995	4,713	3,339	23,133	31,185
1996	4,937	3,208	24,485	32,630
1997	4,584	2,881	26,260	33,725
1998	4,899	3,042	26,313	34,254
1999	4,684	3,281	26,074	34,039
2000	4,313	2,636	24,976	31,925
2001	4,132	2,512	25,392	32,036
2002	4,167	2,635	26,250	33,052
2003	4,148	2,538	25,168	31,854
2004	4,101	2,430	25,846	32,377
2005	3,943	2,257	26,020	32,220
2006	3,718	2,346	25,429	31,493
2007	3,595	2,308	24,784	30,687
2008	3,830	2,475	25,574	31,879
2009	3,503	2,044	25,218	30,765
2010	3,573	2,439	26,543	32,555
2011	3,807	2,898	26,296	33,001
2012	3,708	2,517	24,755	30,980
2013	3,659	2,594	24,517	30,770
2014	**3.554**	**2,383**	**24,257**	**30,194**

Source: National Archives and Records Administration, Office of the Federal Register.

* "Other" documents are presidential documents, agency notices, and corrections.

Part C. Code of Federal Regulations Page Counts and Number of Volumes, 1975–2014

Year	Actual Pages Published (includes text, preliminary pages, and tables)				Unrevised CFR Volumes**	Total Pages Complete CFR	Total CFR Volumes (excluding Index)
	Titles 1–50 (minus Title 3)	Title 3 (POTUS Docs)	Index*	Total Pages Published			
1975	69,704	296	792	70,792	432	71,224	133
1976	71,289	326	693	72,308	432	72,740	139
1977	83,425	288	584	84,297	432	84,729	141
1978	88,562	301	660	89,523	4,628	94,151	142
1979	93,144	438	990	94,572	3,460	98,032	148
1980	95,043	640	1,972	97,655	4,640	102,295	164
1981	103,699	442	1,808	105,949	1,160	107,109	180
1982	102,708	328	920	103,956	982	104,938	177
1983	102,892	354	960	104,206	1,448	105,654	178
1984	110,039	324	998	111,361	469	111,830	186
1985	102,815	336	1,054	104,205	1,730	105,935	175
1986	105,973	512	1,002	107,487	1,922	109,409	175
1987	112,007	374	1,034	113,415	922	114,337	185
1988	114,634	408	1,060	116,102	1,378	117,480	193
1989	118,586	752	1,058	120,396	1,694	122,090	196
1990	121,837	376	1,098	123,311	3,582	126,893	199
1991	119,969	478	1,106	121,553	3,778	125,331	199
1992	124,026	559	1,122	125,707	2,637	128,344	199
1993	129,162	498	1,141	130,801	1,427	132,228	202
1994	129,987	936	1,094	132,017	2,179	134,196	202
1995	134,471	1,170	1,068	136,709	1,477	138,186	205
1996	129,386	622	1,033	131,041	1,071	132,112	204
1997	128,672	429	1,011	130,112	948	131,060	200
1998	132,884	417	1,015	134,316	811	135,127	201
1999	130,457	401	1,022	131,880	3,052	134,932	202
2000	133,208	407	1,019	134,634	3,415	138,049	202
2001	134,582	483	1,041	136,106	5,175	141,281	206
2002	137,373	1,114	1,039	139,526	5,573	145,099	207
2003	139,550	421	1,053	141,024	3,153	144,177	214
2004	143,750	447	1,073	145,270	2,369	147,639	217
2005	146,422	103	1,083	147,608	4,365	151,973	221
2006	149,594	376	1,077	151,047	3,060	154,107	222
2007	149,236	428	1,088	150,752	5,258	156,010	222
2008	151,547	453	1,101	153,101	4,873	157,974	222
2009	158,369	412	1,112	159,893	3,440	163,333	225
2010	152,455	512	1,122	154,089	11,405	165,494	226
2011	159,129	486	1,136	160,751	8,544	169,295	230
2012	164,884	472	1,154	166,510	8,047	174,557	235
2013	166,352	520	1,170	168,042	7,454	175,496	235
2014	**165,016**	**538**	**1,170**	**166,724**	**8,544**	**175,268**	**236**

Source: Chart from National Archives and Records Administration, Office of the Federal Register.
Notes: *General Index and Finding Aids volume for 1975 and 1976. ** Unrevised CFR volumes page totals include those previous editions for which a cover only was issued during the year or any previous editions for which a supplement was issued.

Part D. Number of Regulatory Reviews at the Office of Information and Regulatory Affairs, 1993–2014

									Average Days Review Time		
Year	Prerule reviews	Proposed rule reviews	Interim final rule reviews	Final rule reviews	Notice reviews	Total reviews	ES reviews	Non-ES reviews	Days ES reviews	Days non-ES reviews	Overall average days
1993	2	976	6	1,155	28	2,167	106	2,061	53	42	43
1994	16	317	68	302	128	831	134	697	33	30	31
1995	8	225	64	270	53	620	74	546	41	35	35
1996	28	160	56	232	31	507	74	433	39	42	42
1997	20	196	64	174	51	505	81	424	47	54	53
1998	15	192	58	182	40	487	73	414	33	50	48
1999	19	247	71	214	36	587	86	501	51	53	53
2000	13	210	66	253	40	582	92	490	60	62	62
2001	9	274	95	285	37	700	111	589	46	60	58
2002	23	261	81	249	55	669	100	569	44	46	46
2003	23	232	92	309	59	715	101	614	42	50	49
2004	26	237	64	241	58	626	85	541	35	55	53
2005	18	221	66	247	59	611	82	529	39	59	57
2006	12	229	43	270	46	600	71	529	34	59	56
2007	22	248	44	250	25	589	85	504	49	64	61
2008	17	276	39	313	28	673	135	538	53	63	61
2009	28	214	67	237	49	595	125	470	33	40	39
2010	36	261	84	232	77	690	138	552	48	51	51
2011	24	317	76	262	61	740	117	623	51	60	58
2012	12	144	33	195	40	424	83	341	69	81	79
2013	11	177	33	160	37	418	104	314	121	143	137
2014	**17**	**201**	**43**	**144**	**46**	**452**	**114**	**338**	**106**	**134**	**127**

Source: Author search on RegInfo.gov, "Review Counts" database search engine under Regulatory Review heading.

Note: ES = economically significant.

Part E. Unified Agenda Rules History, 1983–2014

Total Number of Rules Under Consideration or Enacted

1980s		
1983	April	2,863
	October	4,032
1984	April	4,114
	October	4,016
1985	April	4,265
	October	4,131
1986	April	3,961
	October	3,983
1987	April	4,038
	October	4,005
1988	April	3,941
	October	4,017
1989	April	4,003
	October	4,187

1990s		
1990	April	4,332
	October	4,470
1991	April	4,675
	October	4,863
1992	April	4,186
	October	4,909
1993	April	4,933
	October	4,950
1994	April	5,105
	October	5,119
1995	April	5,133
	October	4,735
1996	April	4,570
	October	4,680
1997	April	4,417
	October	4,407
1998	April	4,504
	October	4,560
1999	April	4,524
	October	4,568

2000s		
2000	October	4,699
2001	October	4,509
2002	October	4,187
2003	December	4,266
2004	December	4,083
2005	October	4,062
2006	December	4, 052
2007	December	3,882
2008	December	4,004
2009	December	4,043
2010	December	4,225
2011	December	4,128
2012	Year-End*	4,062
2013	November	3,305
2014	November	3,415

Sources: Compiled from "The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions," *Federal Register*, various years' editions; also from online edition at http://www.reginfo.gov.

*Spring edition skipped in 2012.

Part F. Agenda Rules History by Department and Agency, 1999–2013

	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999
Advisory Council on Historic Preservation						0	0	0		1	1	1	0	1	1
Agency for International Development	5	10	14	14	12	7	10	8	10	8	8	7	6	6	5
Architectural and Transportation Barriers Compliance Board	8		8	7	6	5	5	4	3	4	4	5	5	7	8
Commission on Civil Rights	1		1	1	1	2	1	1	1	1	1	1	1	1	1
Commodity Futures Trading Commission	33	83	68	56	32	25	19	14	11	15	15	19	30	21	19
Consumer Financial Protection Bureau	26	34													
Consumer Product Safety Commission	33	48	38	51	39	31	19	24	18	18	20	20	21	20	17
Corporation for National and Community Service	4	5	13	10	7	7	9	11	11	8	9	16	9	6	4
Court Services/Offender Supervision, D.C.	3	3	3	2	2	2	2	1	1	1	3	7	5	0	0
CPBSD*	2	2	3	3	3	3	5	6	6	5	0	0	0	0	0
Department of Agriculture	159	276	265	287	327	374	290	311	292	279	323	314	312	327	345
Department of Commerce	250	415	328	296	300	325	303	302	296	273	300	270	342	390	366
Department of Defense	104	146	140	150	133	109	131	143	163	126	108	87	93	117	121
Department of Education	20	24	18	23	22	17	13	16	9	11	13	14	8	21	32
Department of Energy	92	108	96	96	85	54	47	63	61	50	66	53	61	67	64
Department of Health and Human Services	200	204	251	312	231	236	259	257	249	233	219	219	277	308	300
Department of Homeland Security	139	160	232	230	237	252	267	280	295	314	338				
Department of Housing and Urban Development	52	58	65	65	60	73	86	92	90	103	109	100	89	113	128
Department of Justice	95	112	120	137	121	138	140	139	124	125	122	249	229	202	201
Department of Labor	84	98	90	99	104	96	94	93	93	88	89	102	141	156	151
Department of State	41	63	35	30	18	27	28	28	24	21	15	41	32	21	27
Department of the Interior	353	320	325	259	277	287	264	305	303	287	295	298	423	418	309
Department of Transportation	220	232	224	223	230	200	199	215	227	301	365	543	511	536	539
Department of Treasury	428	487	497	580	528	521	545	501	514	532	530	513	458	450	400
Department of Veterans Affairs	66	85	82	81	78	80	65	77	76	79	87	104	164	141	130
Environmental Protection Agency	179	223	318	345	331	330	336	372	400	416	417	409	416	449	456
Equal Employment Opportunity Commission	9	9	7	7	7	5	7	8	6	3	4	4	3	6	9
Export-Import Bank of the United States		1													
Farm Credit Administration	30	30	25	23	25	19	12	19	20	20	21	14	17	17	19
Farm Credit System Insurance Corporation			25		1	1	0	1	1	1	1	1	1	3	3
Federal Acquisition Regulation	40	50	51	85	55	44	36	42	44	45	49	43	48	56	49
Federal Communications Commission	132	118	103	147	145	143	145	139	143	146	134	141	145	137	128
Federal Council on the Arts and Humanities						1									
Federal Deposit Insurance Corporation	17	22	21	21	21	19	18	24	16	20	17	17	22	26	25
Federal Emergency Management Agency						0	0	0	0	0	0	24	30	26	33
Federal Energy Regulatory Commission	29	40	41	36	37	39	41	47	35	23	21	19	8	18	20
Federal Housing Finance Agency	20	32	25	27	30	10	3	8	8	9	11	9	12	12	18
Federal Housing Finance Board						3									

Federal Maritime Commission	6	4	8	4	6	3	4	3	5	7	11	8	7	9	9	
Federal Mediation and Conciliation Service		1	1	2	2	2	1	1	2	2	3	4	3	2	1	
Federal Reserve System	16	25	29	22	26	18	20	13	17	18	18	24	32	33	22	
Financial Stability Oversight Council		2														
Federal Trade Commission	20	23	24	19	20	17	14	16	15	14	12	10	13	14	16	
General Services Administration	18	21	29	34	49	54	26	34	33	27	37	40	35	40	51	
Institute of Museum and Library Services	3	3	1	2	1	2	1	1	4	3	6	5	5	4	1	
National Aeronautics and Space Administration	23	37	46	26	32	19	11	15	20	27	34	13	17	11	7	
National Archives and Records Administration	6	6	4	9	7	10	15	21	17	22	19	20	19	21	21	
National Credit Union Administration	24	31	28	24	24	22	24	29	27	26	27	20	22	16	26	
National Endowment for the Arts	7	8			2	3	2	2	2	2	6	5	5	5	5	
National Endowment for the Humanities	4	3	5	4	3	3	3	3	3	3	8	9	8	7	6	
National Indian Gaming Commission	5	15	15	9	17	18	19	16	15	14	14	16	15	14	14	
National Labor Relations Board	1	1														
National Science Foundation	2	3	3	2	3	3	0	2	3	3	2	2	3	5	4	
Nuclear Regulatory Commission	53	73	64	63	61	54	53	45	49	42	45	39	42	55	57	
Office of Federal Housing Enterprise Oversight						10	9	8	6	4	4	7	9	5	5	
Office of Government Ethics	4	4	5	7	7	6	9	8	7	7	9	10	11	11	12	
Office of Management and Budget	2	5	8	7	7	2	1	2	2	3	4	4	5	5	9	
Office of Personnel Management	54	73	87	77	77	80	75	93	94	103	90	72	91	110	112	
Office of Special Counsel						0	0	0	0	0	0	0	0	3	2	
Panama Canal Commission							0	0	0	0	0	0	0	0	4	
Peace Corps	4	5	5	1	1	7	6	6	5	4	9	9	9	8	5	
Pension Benefit Guaranty Corporation	13	13	12	10	10	12	12	13	9	6	4	6	11	10	12	
Postal Regulatory Commission	2	2	1	3	2	2	3	0	0	0	0	0	0	0	0	
Presidio Trust						0	0	0	2	2	1	2	2	3	3	
Privacy and Civil Liberties Oversight Board	1					0	1	0	0	0	0	0	0	0	0	
Railroad Retirement Board	1	1	1	1	1	3	2	6	5	6	11	13	13	19	16	
Recovery Accountability and Transparency Board	3	2		1	3											
Securities and Exchange Commission	76	89	107	75	74	72	76	71	64	79	71	73	80	77	80	
Selective Service System			1	1	1	1	1	1	1	1	1	1	1	1	1	
Small Business Administration	30	43	48	51	39	26	28	32	34	29	33	40	37	41	35	
Social Security Administration	44	49	53	63	58	64	63	53	68	59	64	63	85	82	67	
Special Insp. Gen. for Afghanistan Reconstr.		4														
Surface Transportation Board	9	10	11	5	5	6	4	7	3	4	5	5	4	3	3	
Tennessee Valley Authority						0	0	0	0	0	2	2	3	3	1	
Udall Institute for Environmental Conflict Res.						0	0	0	0	0	1	1	3	3	3	
TOTAL	**3,305**	**4,062**	**4,128**	**4,225**	**4,043**	**4,004**	**3,882**	**4,052**	**4,062**	**4,083**	**4,266**	**4,187**	**4,509**	**4,699**	**4,538**	

Sources: Compiled from "The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions," *Federal Register*, various years' editions; and from online edition at http://www.reginfo.gov.

*Committee for Purchase from People Who Are Blind or Severely Disabled.

Part G. Listing of 200 Economically Significant Rules, Year-End 2014

Active Rulemakings (131)

DEPARTMENT OF AGRICULTURE

1. USDA/RBS, Final Rule Stage, Rural Energy for America Program, 0570-AA76
2. USDA/RBS, Final Rule Stage, Strategic Economic and Community Development, 0570-AA94
3. USDA/RHS, Proposed Rule Stage, Citizenship Implementation, 0575-AC86
4. USDA/RHS, Final Rule Stage, Multifamily Housing (MFH) Reinvention, 0575-AC13
5. USDA/APHIS, Final Rule Stage, User Fees for Agricultural Quarantine and Inspection Services, 0579-AD77
6. USDA/AMS, Proposed Rule Stage, National Organic Program—Organic Aquaculture Standards, 0581-AD34
7. USDA/FSIS, Final Rule Stage, Mandatory Inspection of Fish of the order Siluriformes and Products Derived From Such Fish, 0583-AD36
8. USDA/FNS, Final Rule Stage, Eligibility, Certification, and Employment and Training Provisions of the Food, Conservation, and Energy Act of 2008, 0584-AD87
9. USDA/FNS, Final Rule Stage, Supplemental Nutrition Assistance Program: Farm Bill of 2008 Retailer Sanctions, 0584-AD88

DEPARTMENT OF DEFENSE

10. DOD/DODOASHA, Final Rule Stage, CHAMPUS/TRICARE: Pilot Program for Refills of Maintenance Medications for TRICARE for Life Beneficiaries Through the TRICARE Mail Order Program, 0720-AB60
11. DOD/OS, Proposed Rule Stage, Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 0790-AJ10

DEPARTMENT OF EDUCATION

12. ED/OESE, Final Rule Stage, School Improvement Grants (SIG) Program, 1810-AB22
13. ED/OSERS, Proposed Rule Stage, Workforce Innovation and Opportunity Act, 1820-AB69
14. ED/OCTAE, Proposed Rule Srage, Workforce Innovation and Opportunity Act, 1830-AA21
15. ED/OPE, Proposed Rule Stage, Tirle IV of the HEA—Program Integrity and Improvement, 1840-AD14

DEPARTMENT OF ENERGY

16. DOE/ENDEP, Final Rule Stage, Advanced Technology Vehicles Manufacturing Incentive Program, 1901-AB25
17. DOE/EE, Prerule Stage, Energy Conservation Standards for Wine Chillers and Miscellaneous Refrigeration Products, 1904-AC51
18. DOE/EE, Prerule Stage, Energy Conservarion Standards for Portable Air Conditioners, 1904-AD02
19. DOE/EE, Prerule Stage, Energy Conservation Standards for Central Air Conditioners aud Heat Pumps, 1904-AD37
20. DOE/EE, Proposed Rule Srage, Fossil Fuel–Generated Energy Consumprion Reduction for New Federal Buildings and Major Renovations of Federal Buildings, 1904-AB96
21. DOE/EE, Proposed Rule Stage, Energy Efficiency Standards for Manufactured Housing, 1904-AC11
22. DOE/EE, Proposed Rule Stage, Energy Efficiency Standards for Residenrial Dehumidifiers, 1904-AC81
23. DOE/EE, Proposed Rule Stage, Energy Conservation Standards for Single Package Vertical Air Conditioners and Single Package Vertical Heat Pumps, 1904-AC85
24. DOE/EE, Proposed Rule Stage, Energy Conservation Standards for Small, Large, and Very Large Commercial Package A/C and Heating Equipment, 1904-AC95
25. DOE/EE, Proposed Rule Stage, Srandards for Refrigerated Bottled or Canned Beverage Vending Machines, 1904-AD00
26. DOE/EE, Proposed Rule Stage, Energy Conservation Standards for Commercial Warm Air Furnaces, 1904-AD11
27. DOE/EE, Proposed Rule Stage, Energy Conservation Standards for Residential Non-weatherized Gas Furnaces, 1904-AD20
28. DOE/EE, Proposed Rule Stage, Energy Conservation Srandards for Hearth Producrs, 1904-AD35
29. DOE/EE, Final Rule Stage, Energy Efficiency Srandards for Automatic Commercial Ice Makers, 1904-AC39
30. DOE/EE, Final Rule Stage, Energy Conservation Srandards for General Service Fluorescent Lamps and Incandescent Reflector Lamps, 1904-AC43
31. DOE/EE, Final Rule Stage, Coverage Determination for Computers and Bartery Backup Systems, 1904-AD04
32. DOE/OGC, Proposed Rule Srage, Convenrion on Supplementary Compensation for Nuclear Damage Contingent Cosr Allocation, 1990-AA39
33. DOE/NNSA, Final Rule Stage, Assistance to Foreign Atomic Energy Activities, 1994-AA02

DEPARTMENT OF HEALTH AND HUMAN SERVICES

34. HHS/FDA, Proposed Rule Stage, Over-the-Counter Drug Review—Internal Analgesic Products, 0910-AF36
35. HHS/FDA, Proposed Rule Stage, Over-the-Counter Drug Review—Topical Antimicrobial Drug Products, 0910-AF69
36. HHS/FDA, Proposed Rule Stage, Updated Standards for Labeling of Pet Food, 0910-AG09
37. HHS/FDA, Proposed Rule Stage, Current Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventive Controls for Food for Animals, 0910-AG10
38. HHS/FDA, Proposed Rule Stage, Over-the-Counter Drug Review—Pediatric Dosing for Cough/Cold Products, 0910-AG12
39. HHS/FDA, Proposed Rule Stage, Electronic Distribution of Prescribing Informarion for Human Prescription Drugs Including Biological Products , 0910-AG18
40. HHS/FDA, Proposed Rule Stage, Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption, 0910-AG35
41. HHS/FDA, Proposed Rule Srage, Current Good Manufacturing and Hazard Analysis, and Risk-Based Preventive Controls for Human Food, 0910-AG36
42. HHS/FDA, Proposed Rule Stage, Requirements for the Testing and Reporting of Tobacco Product Consrituenrs, Ingredients, and Additives, 0910-AG59
43. HHS/FDA, Proposed Rule Stage, Foreign Supplier Verification Program, 0910-AG64
44. HHS/FDA, Proposed Rule Srage, Radiology Devices; Designation of Special Controls for the Computed Tomography X-Ray System, 0910-AH03
45. HHS/FDA, Proposed Rule Stage, Regulations on Human Drug Compounding Under Sections 503A and 503B of the Federal Food, Drug, and Cosmetic Act, 0910-AH10
46. HHS/FDA, Final Rule Stage, "Tobacco Products" Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act, 0910-AG38
47. HHS/FDA, Final Rule Srage, Food Labeling: Calorie Labeling of Articles of Food Sold in Vending Machines, 0910-AG56
48. HHS/FDA, Final Rule Stage, Food Labeling: Nutrition Labeling of Srandard Menu Items in Restaurants and Similar Retail Food Esrablishment, 0910-AG57
49. HHS/FDA, Final Rule Srage, Revision of Postmarketing Reporting Requirements Discontinuance or Interruption in Supply of Certain Products (Drug Shortages), 0910-AG88
50. HHS/FDA, Final Rule Stage, Combinations of Bronchodilators With Expectorants; Cold, Cough, Allergy, Bronchodilator, and Antiasthmatic Drug Products for Over-the-Counter Human Use, 0910-AH16
51. HHS/CDC, Final Rule Stage, World Trade Center Health Program Requirements for Enrollment, Appeals, Certification of Health Conditions Reimbursement, 0920-AA44
52. HHS/CMS, Proposed Rule Stage, Home Health Agency Conditions of Participation (CMS-3819-F), 0938-AG81
53. HHS/CMS, Proposed Rule Stage, Reform of Requirements for Long-Term Care Facilities (CMS-3260-P), 0938-AR61
54. HHS/CMS, Proposed Rule Stage, Medicare Shared Savings Program; Accountable Care Organizations (CMS-1461-P), 0938-AS06
55. HHS/CMS, Proposed Rule Stage, CY 2016 Notice of Benefit and Payment Parameters (CMS-9944-P), 0938-AS19
56. HHS/CMS, Proposed Rule Stage, Hospital and Critical Access Hospital (CAH) Changes to Promote Innovation, Flexibility, and Improvement in Patient Care (CMS-3295-P), 0938-AS21
57. HHS/CMS, Proposed Rule Stage, Mental Health Parity and Addiction Equity Act of 2008; the Application to Medicaid Managed Care, CHIP, and Alternative Benefit Plans (CMS-2333-P), 0938-AS24
58. HHS/CMS, Proposed Rule Stage, Medicaid Managed Care (CMS-2390-P), 0938-AS25
59. HHS/CMS, Proposed Rule Stage, Electronic Health Record (EHR) Incentive Programs—Stage 3 (CMS-3310-P), 0938-AS26
60. HHS/CMS, Proposed Rule Stage, Medicare Clinical Diagnostic Laboratory Test Payment System (CMS-1621-P), 0938-AS33
61. HHS/CMS, Proposed Rule Srage, CY 2016 Revisions to Payment Policies under the Physician Fee Schedule and Other Revisions to Medicare Part B (CMS-1631-P), 0938-AS40
62. HHS/CMS, Proposed Rule Stage, Hospital Inpatient Prospective Payment System for Acute Care Hospirals and the Long-Term Care Hospital Prospective Payment System and FY 2016 Rates (CMS-1632-P), 0938-AS41
63. HHS/CMS, Proposed Rule Stage, CY 2016 Hospital Outpatient PPS Policy Changes and Payment Rates and Ambulatory Surgical Center Payment System Policy Changes and Payment Rares (CMS-1633-P), 0938-AS42
64. HHS/CMS, Proposed Rule Stage, FY 2016 Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities (CMS-1622-P), 0938-AS44

65. HHS/CMS, Proposed Rule Stage, FY 2016 Inpatient Rehabilitation Facility Prospective Payment System (CMS-1624-P), 0938-AS45
66. HHS/CMS, Proposed Rule Stage, CY 2016 Home Health Prospective Payment System Refinements and Rate Update (CMS-1625-P), 0938-AS46
67. HHS/CMS, Proposed Rule Stage, FY 2016 Inpatient Psychiatric Facilities Prospective Payment System—Rate Update (CMS-1627-P), 0938-AS47
68. HHS/CMS, Proposed Rule Srage, CY 2016 Changes to the End-Stage Renal Disease (ESRD) Prospective Payment System and Quality Incentive Program (CMS-1628-P), 0938-AS48
69. HHS/CMS, Final Rule Stage, Face-to-Face Requirements for Home Health Services; Policy Changes and Clarifications Related to Home Health (CMS-2348-F), 0938-AQ36
70. HHS/CMS, Final Rule Stage, Covered Outpatient Drugs (CMS-2345-F), 0938-AQ41
71. HHS/CMS, Final Rule Stage, Eligibility Notices, Fair Hearing and Appeal Processes for Medicaid and Exchange Eligibility Appeals, and Other Eligibility and Enrollment Provisions (CMS-2334-F2), 0938-AS27
72. HHS/CMS, Final Rule Stage, CY 2016 Inpatient Hospital Deductible and Hospital and Extended Care Services Coinsurance Amounts (CMS-8059-N), 0938-AS36

DEPARTMENT OF HOMELAND SECURITY

73. DHS/OS, Final Rule Stage, Ammonium Nitrate Security Program, 1601-AA52
74. DHS/USCG, Prerule Stage, Commercial Fishing Industry Vessels, 1625-AA77
75. DHS/USCG, Proposed Rule Stage, Updates to Maritime Security, 1625-AB38
76. DHS/USCG, Final Rule Stage, Commercial Fishing Vessels—Implementation of 2010 and 2012 Legislation, 1625-AB85
77. DHS/USCBP, Final Rule Stage, Changes to the Visa Waiver Program to Implement the Electronic System for Travel Authorization Program, 1651-AA72
78. DHS/USCBP, Final Rule Stage, Electronic System for Travel Authorization: Fee for Use of the System, 1651-AA83
79. DHS/TSA, Proposed Rule Stage, Security Training for Surface Mode Employees, 1652-AA55
80. DHS/TSA, Proposed Rule Stage, Standardized Vetting, Adjudication, and Redress Services, 1652-AA61
81. DHS/TSA, Final Rule Stage, Passenger Screening Using Advanced Imaging Technology, 1652-AA67

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

82. HUD/CPD, Final Rule Stage, Housing Trust Fund, 2506-AC30

DEPARTMENT OF THE INTERIOR

83. DOI/BOEM, Proposed Rule Stage, Arctic Regulations, 1010-AD85
84. DOI/BSEE, Proposed Rule Stage, Blowout Prevention Systems and Well Control, 1014-AA11
85. DOI/BSEE, Proposed Rule Stage, Arctic Regulations, 1014-AA21

DEPARTMENT OF JUSTICE

86. DOJ/DEA, Final Rule Stage, Electronic Prescriptions for Controlled Substances, 1117-AA61
87. DOJ/DEA, Final Rule Stage, Retail Sales of Scheduled Listed Chemical Products; Chemical; Self-Certification of Regulated Sellers of Scheduled Listed Chemical Products, 1117-AB05
88. DOJ/CRT, Proposed Rule Stage, Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of Public Accommodations, 1190-AA61
89. DOJ/CRT, Proposed Rule Stage, Nondiscrimination on the Basis of Disability: Accessibility of Web Information and Services of State and Local Governments, 1190-AA65

DEPARTMENT OF LABOR

90. DOL/ETA, Proposed Rule Srage, Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, 1205-AB72
91. DOL/EBSA, Proposed Rule Stage, Conflict of Interest Rule-Investment Advice, 1210-AB32
92. DOL/OSHA, Prerule Stage, Infectious Diseases, 1218-AC46
93. DOL/OSHA, Proposed Rule Stage, Occupational Exposure to Crystalline Silica, 1218-AB70
94. DOL/OSHA, Proposed Rule Stage, Occupational Exposure to Beryllium, 1218-AB76
95. DOL/OSHA, Final Rule Stage, Walking Working Surfaces and Personal Fall Protection Systems (Slips, Trips, and Fall Prevention), 1218-AB80
96. DOL/WHD, Proposed Rule Stage, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 1235-AA11

97. DOL/WHD, Final Rule Stage, Establishing a Minimum Wage for Contractors, Executive Order 13658, 1235-AA10

DEPARTMENT OF TRANSPORTATION

98. DOT/FAA, Final Rule Stage, Flight and Duty Time Limitations and Rest Requirements; Supplemental Regulatory Impact Analysis, 2120-AJ58
99. DOT/FMCSA, Proposed Rule Stage, Carrier Safety Fitness Determination, 2126-AB11
100. DOT/FMCSA, Proposed Rule Stage, Electronic Logging Devices and Hours of Service Supporting Documents (MAP-21), 2126-AB20
101. DOT/FMCSA, Proposed Rule Stage, Heavy Vehicle Speed Limiters, 2126-AB63
102. DOT/FMCSA, Final Rule Stage, Commercial Driver's License Drug and Alcohol Clearinghouse (MAP-21), 2126-AB18
103. DOT/FMCSA, Final Rule Stage, Inspection, Repair, and Maintenance; Driver-Vehicle Inspection Report (RRR), 2126-AB46
104. DOT/NHTSA, Proposed Rule Stage, Fuel Efficiency Standards for Medium- and Heavy-Duty Vehicles and Work Trucks: Phase 2, 2127-AL52
105. DOT/NHTSA, Final Rule Stage, Electronic Stability Control Systems for Heavy Vehicles (MAP-21), 2127-AK97
106. DOT/FRA, Proposed Rule Srage, Passenger Equipment Safety Standards; Standards for Alternative Compliance and High-Speed Trainsets, 2130-AC46
107. DOT/PHMSA, Proposed Rule Stage, Pipeline Safety: Amendments to Parts 192 and 195 to Require Valve Installation and Minimum Rupture Detection Standards, 2137-AF06
108. DOT/PHMSA, Final Rule Stage, Hazardous Materials: Enhanced Tank Car Srandards and Operational Controls for High-Hazard Flammable Trains, 2137-AE91

DEPARTMENT OF THE TREASURY

109. TREAS/DO, Final Rule Stage, Small Business Lending Fund Refinance, 1505-AC34
110. TREAS/DO, Final Rule Stage, Assessment of Fees for Large Bank Holding Companies and Nonbank Financial Companies Supervised by the Federal Reserve To Cover the Expenses of the Financial Research Fund, 1505-AC42
111. TREAS/DO, Final Rule Stage, Restore Act Program, 1505-AC44

DEPARTMENT OF VETERANS AFFAIRS

112. VA, Final Rule Stage, Caregivers Program, 2900-AN94
113. VA, Final Rule Stage, Medications Copayment Freeze for 2015, 2900-AP15
114. VA, Final Rule Stage, Expanded Access to Non-VA Care through the Veterans Choice Program, 2900-AP24

ENVIRONMENTAL PROTECTION AGENCY

115. EPA/WATER, Proposed Rule Stage, National Primary Drinking Water Regulations for Lead and Copper: Regulatory Revisions, 2040-AF15
116. EPA/WATER, Final Rule Stage, Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 2040-AF14
117. EPA/SWER, Final Rule Stage, Standards for the Management of Coal Combustion Residuals Generated by Commercial Electric Power Producers, 2050-AE81
118. FPA/SWER, Final Rule Stage, Revising Underground Storage Tank Regulations—Revisions to Existing Requirements and New Requirements for Secondary Containment and Operator Training, 2050-AG46
119. EPA/AR, Proposed Rule Srage, Review of the National Ambient Air Quality Standards for Ozone, 2060-AP38
120. EPA/AR, Proposed Rule Stage, Carbon Pollution Emission Guidelines for Existing Stationary Sources: EGUs in Indian Country and U.S. Territories, 2060-AR33
121. EPA/AR, Proposed Rule Stage, Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Dury Engines and Vehicles—Phase 2, 2060-AS16
122. EPA/AR, Final Rule Stage, Standards of Performance for New Residential Wood Heaters and New Residential Hydronic Heaters and Forced-Air Furnaces, 2060-AP93
123. EPA/AR, Final Rule Stage, Renewable Fuel 2014 Volume Standards, 2060-AR76
124. EPA/OCSPP, Proposed Rule Stage, Lead; Renovation, Repair, and Painting Program for Public and Commercial Buildings, 2070-AJ56

ARCHITECTURAL AND TRANSPORATION BARRIERS COMPLIANCE BOARD

125. ATBCB, Proposed Rule Stage, Information and Communication Technology Srandards and Guidelines, 3014-AA37
126. ATBCB, Final Rule Stage, Americans with Disabilities Act Accessibility Guidelines for Passenger Vessels, 3014-AA11

FEDERAL ACQUISITION REGULATION

127. FAR, Final Rule Stage, Federal Acquisition Regulation (FAR); FAR Case 2015-003; Establishing a Minimum Wage for Contractors, 9000-AM82

FEDERAL DEPOSIT INSURANCE CORPORATION

128. FDIC, Proposed Rule Stage, Margin and Capital Requirements for Covered Swap Entities, 3064-AE21

GENERAL SERVICES ADMINISTRATION

129. GSA, Proposed Rule Stage, General Services Administration Acquisition Regulation (GSAR); GSAR Case 2013-G504, Transactional Data Reporting, 3090-AJ51

NUCLEAR REGULATORY COMMISSION

130. NRC, Proposed Rule Stage, Revision of Fee Schedules: Fee Recovery for FY 2015 [NRC-2014-0200], 3150-AJ44
131. NRC, Final Rule Stage, Domestic Licensing of Source Marerial—Amendments/Inregrated Safety Analysis [NRC-2009-0079], 3150-AI50

Completed Actions (31)

DEPARTMENT OF AGRICULTURE

132. USDA/FSA, Disaster Assistance Programs, Payment Limitations, and Payment Eligibility, 0560-AI21
133. USDA/FSA, Cotton Transition Assistance Program, 0560-AI22
134. USDA/FSA, Margin Protection Program for Dairy and Dairy Product Donation Program, 0560-AI23
135. USDA/FSA, Agriculture Risk Coverage and Price Loss Coverage Program, 0560-AI24

DEPARTMENT OF EDUCATION

136. ED/OPE, Gainful Employment, 1840-AD15
137. DOE/EE, Energy Conservation Standards for Residential Furnace Fans, 1904-AC22

DEPARTMENT OF HEALTH AND HUMAN SERVICES

138. HHS/HRSA, 340B Drug Pricing Program Regulations, 0906-AB04
139. HHS/CMS, Pre-Existing Condition Insurance Plan; High Risk Pool (CMS-9995-F), 0938-AQ70
140. HHS/CMS, Early Retiree Reinsurance Program (CMS-9996-F), 0938-AQ78
141. HHS/CMS, Prospective Payment System for Federally Qualified Health Centers; Changes to Contracting Policies for Rural Health Clinics and CLIA Enforcement Actions, for Proficiency Testing Referral (CMS-1443-FC), 0938-AR62
142. HHS/CMS, CY 2015 Inpatient Hospital Deductible and Hospital and Extended Care Services Coinsurance Amounts (CMS-8056-N), 0938-AR94
143. HHS/CMS, CY 2015 Part A Premiums for the Uninsured Aged and for Certain Disabled Individuals Who Have Exhausted Other Entitlement (CMS-8057-N), 0938-AR96
144. HHS/CMS, FY 2015 Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities (SNF) (CMS-1605-F), 0938-AS07
145. HHS/CMS, FY 2015 Inpatient Psychiatric Facilities Prospective Payment System—Rate Update (CMS-1606-F), 0938-AS08
146. HHS/CMSFY 2015 Inpatient Rehabilitation Facility Prospective Payment System (CMS-1608-F), 0938-AS09
147. HHS/CMS, FY 2015 Hospice Payment Rate Update (CMS-1609-F), 0938-AS10
148. HHS/CMS, Hospital Inparient Prospective Payment System for Acute Care Hospitals and the Long-Term Care Hospital Prospective Payment System and Fiscal Year 2015 Rates (CMS-1607-F), 0938-AS11
149. HHS/CMS, CY 2015 Revisions to Payment Policies Under the Physician Fee Schedule and Other Revisions to Medicare Part B (CMS-1612-FC), 0938-AS12
150. HHS/CMS, CY 2015 End-Stage Renal Disease Prospective Payment System, Quality Incentive Program, and Durable Medical Equipment, Prosthetics, Orthorics, and Supplies (CMS-1614-F), 0938-AS13
151. HHS/CMS, CY 2015 Home Health Prospective Payment System Refinements and Rate Update (CMS-1611-F), 0938-AS14
152. HHS/CMS, CY 2015 Hospital Outpatient Prospective Payment System (PPS) Policy Changes and Payment Rates, and CY 2015 Ambulatory Surgical Center Payment System Policy Changes and Payment Rates (CMS-1613-FC), 0938-AS15
153. HHS/CMS, Extension of Payment Adjustment for Low-Volume Hospitals and the Medicare-Dependent Hospital Program Under the FY 2014 Hospital Inpatient Prospective Payment System (CMS-1599-IFC2), 0938-AS18

154. HHS/CMS, Administrative Simplification: Change to the Compliance Date for the International Classification of Diseases, 10th Revision Medical Data Code Sets (CMS-0043-F), 0938-AS31

DEPARTMENT OF THE INTERIOR

155. DOI/FWS, Migratory Bird Hunting; 2014–2015 Migratory Game Bird Hunting Regulations, 1018-AZ80

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156. DOT/MARAD, National Shipping Authority, Ship Manager Citizenship, 2133-AB87

DEPARTMENT OF THE TREASURY

157. TREAS/OCC, Regulatory Capital Rules: Regulatory Capital, Enhanced Supplementary Leverage Ratio Standards for Certain Bank Holding Companies and their Subsidiary Insured Depository Institutions, 1557-AD69
158. TREAS/OCC, Liquidity Coverage Ratio: Liquidity Risk Measurement, Standards, and Monitoring, 1557-AD74

DEPARTMENT OF VETERANS AFFAIRS

159. VA, Copayments for Medications in 2014, 2900-AO91

FEDERAL ENERGY REGULATORY COMMISSION

160. FERC, Version 5 Critical Infrastructure Protection Reliability Standards, 1902-AE66

NUCLEAR REGULATORY COMMISSION

161. NRC, Revision of Fee Schedules: Fee Recovery for FY 2014 [NRC-2013-0276], 3150-AJ32

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162. PRC, Treatment of Rate Reductions, Rate Incentives, and De Minimis Rate Increases for Price Cap Purposes, 3211-AA09

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DEPARTMENT OF AGRICULTURE

163. USDA/FCIC, General Administrative Regulations; Catastrophic Risk Protection Endorsement; Area Risk Protection Insurance Regulations; and the Common Crop Insurance Regulations, Basic Provisions, 0563-AC43

DEPARTMENT OF COMMERCE

164. DOC/NOAA, Taking Marine Mammals Incidental to Conducting Geological and Geophysical Exploration of Mineral and Energy Resources on the Outer Continental Shelf in the Gulf of Mexico, 0648-BB38

DEPARTMENT OF HEALTH AND HUMAN SERVICES

165. HHS/FDA, Food Labeling; Revision of the Nutrition and Supplement Facts Labels, 0910-AF22
166. HHS/FDA, Food Labeling: Serving Sizes of Foods that Can Reasonably Be Consumed at One Eating Occasion; Dual-Column Labeling; Updating, Modifying, and Establishing Certain RACCs, 0910-AF23
167. HHS/FDA, Focused Mitigation Strategies to Protect Food against Inrentional Adulteration, 0910-AG63
168. HHS/FDA, Sanitary Transportation of Human and Animal Food, 0910-AG98
169. HHS/CMS, Emergency Preparedness Requirements for Medicare and Medicaid Participating Providers and Suppliers (CMS-3178-F), 0938-AO91
170. HHS/CMS, Requirements for the Medicare Incentive Reward Program and Provider Enrollment (CMS-6045-F), 0938-AP01
171. HHS/CMS, Prior Authorization Process for Certain Durable Medical Equipment, Prosthetic, Orthotics, and Supplies (DMEPOS) Items (CMS-6050-F), 0938-AR85
172. HHS/CMS, Adoption of Operating Rules for HIPAA Transactions, (CMS-0036-IFC), 0938-AS01

DEPARTMENT OF HOMELAND SECURITY

173. DHS/OS, Collection of Alien Biometric Data Upon Exit From the United States at Air and Sea Ports of Departure, 1601-AA34
174. DHS/USCIS, Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, 1615-AC02
175. DHS/USCG, Survival Craft 2010 Authorization Act Requirements USCG-2014-0221, 1625-AC19
176. DHS/USCBP, Importer Security Filing and Additional Cartier Requirements, 1651-AA70
177. DHS/TSA, Cessation of the Aviation Security Infrastructure Fees (ASIF), 1652-AA01
178. DHS/TSA, General Aviation Security and Other Aircrafr Operaror Security, 1652-AA53
179. DHS/TSA, Adjustment of Passenger Civil Aviation Security Service Fee, 1652-AA68

DEPARTMENT OF LABOR

180. DOL/ETA, Wage Methodology for the Temporary Nonagricultural Employment H-2B Program, Part 2, 1205-AB69
181. DOL/EBSA, Improved Fee Disclosure for Welfare Plans, 1210-AB37
182. DOL/OSHA, Combustible Dust, 1218-AC41
183. DOL/OSHA, Injury and Illness Prevention Program, 1218-AC48
184. DOL/OSHA, Preventing Backover Injuries and Fatalities, 1218-AC51
185. DOL/OSHA, Update to the Hazard Communication Standard, 1218-AC93

DEPARTMENT OF TRANSPORTATION

186. DOT/NHTSA, Establish Side Impact Performance Requirements for Child Restraint Systems (MAP-21), 2127-AK95
187. DOT/NHTSA, Federal Motor Vehicle Safety Standard (FMVSS) 150—Vehicle to Vehicle (V2V) Communication, 2127-AL55

DEPARTMENT OF THE TREASURY

188. TREAS/DO, TARP Standards for Compensation and Corporate Governance, 1505-AC09
189. TREAS/OCC, Treatment of Certain Collateralized Debt Obligations Backed by Trust Preferred Securities, 1557-AD79
190. TREAS/CDFIF, Interim Rule for the CDFI Bond Guarantee Program, 1559-AA01

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191. EPA/WATER, Stormwater Regulations Revision to Address Discharges From Developed Sites, 2040-AF13
192. EPA/SWER, Financial Responsibility Requirements Under CERCLA Section 108(b) for Classes of Facilities in the Hard Rock Mining Industry, 2050-AG61

CONSUMER PRODUCT SAFETY COMMISSION

193. CPSC, Flammability Standard for Upholstered Furniture, 3041-AB35

FEDERAL COMMUNICATIONS COMMISSION

194. FCC, Expanding Broadband and Innovation through Air-Ground Mobile Broadband Secondary Service for Passengers Aboard Aircraft in the 14.0–14.5 GHz Band; GN Docket No. 13-114, 3060-AK02
195. FCC, Broadband Over Power Line Systems; ET Docket No. 04-37, 3060-AI24
196. FCC, Amendment of the Rules Regarding Maritime Automatic Identification Systems (WT Docket No. 04-344), 3060-AJ16
197. FCC, In the Matter of Service Rules for the 698 to 746, 747 to 762, and 777 to 792 MHz Bands, 3060-AJ35
198. FCC, Universal Service Reform Mobility Fund (WT Docket No. 10-208), 3060-AJ58
199. FCC, IP-Enabled Services; WC Docket No. 04-36, 3060-AI48
200. FCC, Implementation of Section 224 of the Act; A National Broadband Plan for Our Future (WC Docket No. 07-245, GN Docket No. 09-51), 3060-AJ64

Source: Data compiled by Clyde Wayne Crews Jr. from "The Regulatory Plan and the Unified Agenda of Federal Regulatory and Deregulatory Actions," *Federal Register*, and from online edition at http://www.reginfo.gov.

Note: The "Regulation Identifier Number" appears at the end of each entry. Sequential numbers in print editions of the "Regulatory Plan and Unified Agenda" no longer apply. For additional information, see "How to Use the Unified Agenda," http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/UA_HowTo.jsp.

Part H. Rules Affecting Small Business, 1996–2013

	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996
Department of Agriculture	45	80	65	84	87	93	73	67	54	52	64	39	56	47	49	63	58	56
Department of Commerce	103	158	115	98	90	107	112	111	108	79	74	77	89	98	88	52	29	46
Department of Defense	12	25	26	16	12	7	13	14	13	12	13	6	8	7	15	21	15	22
Department of Education	3		1	1	0	0	0	1	0	0	0	1	0	0	0	0	1	1
Department of Energy	5	8	6	3	2	1	1	0	0	0	1	0	1	1	0	0	2	2
Department of Health and Human Services	91	85	100	112	94	93	96	109	112	106	96	92	108	107	75	88	100	89
Department of Homeland Security	28	27	34	37	35	42	44	43	43	38	33	0	0	0	0	0	0	0
Department of Housing and Urban Development			0	1	0	1	5	4	4	6	11	6	3	0	1	1	7	9
Department of the Interior	23	24	23	18	17	18	19	29	21	20	26	17	20	18	33	29	28	17
Department of Justice	10	9	9	5	3	2	5	7	8	8	8	13	15	14	14	10	26	27
Department of Labor	22	24	23	26	29	29	26	26	19	19	23	22	26	40	38	41	39	51
Department of State	20	31	21	20	4	3	1	0	1	1	2	6	3	2	0	0	1	2
Department of Transportation	68	65	56	49	45	41	43	60	63	103	151	216	244	266	246	208	44	31
Department of the Treasury	29	39	47	56	48	47	45	37	41	38	27	26	27	31	15	60	50	52
Department of Veterans Affairs	2	1	2	3	2	2	0	0	0	0	0	1	1	3	6	6	7	3
Agency for International Development			1	1	0	0	1	1	0	0	1	2	1	0	0	0	0	0
Architectural and Transportation Barriers Compliance Board	1	1	1		0	0	0	0	0	0	0	1	1	2	2	3	0	0
Commodity Futures Trading Commission			0		1	1	1	0	1	1	2	0	0	0	0	1	0	0
Consumer Financial Protection Bureau	4	8	5															
Consumer Product Safety Commission		2	0			0	0	1	0	0	0	0	0	0	0	0	0	1
Corporation for National and Community Service			0		0	0	0	1	1	0	0	0	0	0	0	0	0	0
Environmental Protection Agency	6	49	73	95	89	83	85	95	110	122	135	167	185	205	179	178	163	152
Equal Employment Opportunity Commission	2	3	5	5	4	2	3	3	3	0	0	0	2	0	0	2	1	0
Federal Acquisition Regulation			10	5	4	6	5	5	7	5	5	6	9	13	16	11	15	20
Federal Communications Commission	17	15	78	112	110	110	109	108	113	113	104	109	117	105	91	82	70	75
Federal Deposit Insurance Corporation	99	89	2	1														
Federal Emergency Management Agency	4	5					0	0	0	0	0	1	1	1	0	0	0	1

(continued)

Part H. Rules Affecting Small Business, 1996–2013 *(continued)*

	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996
Federal Energy Regulatory Commission			0			0	1	0	0	0	0	0	0	0	1	0	0	0
Federal Housing Finance Board			0			0	0	0	0	0	0	0	0	0	0	1	0	0
Federal Maritime Commission	1	1	3	3	3	3	2	3	5	7	10	7	6	7	4	5	0	0
Federal Mediation and Conciliation Service	5	12	0			0	0	0	0	0	0	0	1	1	0	0	0	0
Federal Reserve System	18	21	17	8	6	5	5	3	6	5	3	7	10	8	2	5	2	4
Federal Trade Commission			22	16	16	13	11	13	12	11	9	9	9	9	10	10	11	7
General Services Administration	2	3	4	5	6	7	3	3	3	1	5	4	1	1	2	2	3	6
National Aeronautics and Space Administration	2	2	3			0	0	0	0	0	0	0	0	0	0	1	0	1
National Archives and Records Administration			0			0	0	0	1	1	1	0	0	0	0	1	1	1
National Credit Union Administration		2	4	4	7	3	1	4	1	2	0	0	0	0	0	0	1	1
National Endowment for the Arts	2	2				0	0	0	0	0	2	2	0	0	0	0	0	0
National Endowment for the Humanities			0			0	0	0	0	0	0	0	0	0	0	0	1	0
Nuclear Regulatory Commission	3	6	3	1	2	1	2	1	1	0	3	5	5	3	5	8	9	8
Office of Management and Budget			0			0	0	0	0	0	0	0	0	1	2	1	1	2
Railroad Retirement Board			0			0	0	0	0	0	0	0	0	0	0	0	1	1
Resolution Trust Corporation								0	17	0	0	0	0	0	0	0	0	0
Securities and Exchange Commission	27	38	27	21	21	19	29	16	0	20	25	28	26	40	39	27	34	48
Small Business Administration			35	39	20	13	15	21	19	18	24	21	21	24	28	20	13	17
Social Security Administration	15	19	1		1	1	1	1	1	1	1	1	0	0	2	0	0	1
TOTAL	**669**	**854**	**822**	**845**	**758**	**753**	**757**	**787**	**788**	**789**	**859**	**892**	**996**	**1,054**	**963**	**937**	**733**	**754**

Source: Compiled from "The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions," *Federal Register*, various years' editions, www.reginfo.gov.

Part I. Federal Rules Affecting State and Local Governments, 2006–2014

	2014 Active, Completed, Long Term						2013 Active, Completed, Long Term					
	State			Local			State			Local		
	A	C	LT	A	C	LT	A	C	LT	A	C	LT
Department of Agriculture	26	6		22	4		37	5	1	27	4	1
Department of Commerce	12	5	3	5	3	1	12		1	8		1
Department of Defense							1			1		
Department of Education	4			1			4	2		2	1	
Department of Energy	9		1	8		1	9			8		
Department of Health and Human Services	46	9	8	19	2	3	35	14	5	14	3	1
Department of Homeland Security	8	4	5	4	2	7	11	2	5	8	1	4
Department of Housing and Urban Development	6	1	1	7		1	6	1	1	6	1	1
Department of Interior	46	4	1	21	1		35	1	1	14	1	1
Department of Justice	8		3	6		2	8	1	3	5		3
Department of Labor	17	2	4	9	2	2	13	4	3	6	3	2
Department of State	1						1	1				
Department of Transportation	12	1	1	4	1		11	1	2	3		
Department of Treasury	9	3		6	2		16		1	15		
Department of Veterans Affairs	2			1			2					
Environmental Protection Agency	54	5	9	36	4	3	39	4	12	25	3	7
Architectural and Transportation Barriers Compliance Board	3	1	1	3		1	3		2	2		2
CPBSD*												
Advisory Council on Historic Preservation												
Consumer Financial Protection Bureau	1		1				1		1			
Court Sevices/Offender Supervision, D.C.												
Corp. for National and Community Service	1		1	1		1			2			2
Federal Emergency Management Agency												
Equal Employment Opportunity Commission	5			5			4	1		4	1	
General Services Administration	4			3			3			3		
Gulf Coast Ecosystem Restoration Council	1		1									
National Aeronatics and Space Administation												
National Archives and Records Administration	1			1				1			1	
Institute of Museum and Library Services												
National Endowment for the Arts	1			1			1			1		
National Endowment for the Humanities												
Office of Management and Budget												
Small Business Administration	1											
Social Security Administration			1						1			
Federal Communications Commission		1	28		1	20			29			21
Federal Energy Regulatory Commission												
Federal Reserve System		1			1				1			1
Federal Trade Commission												
National Credit Union Administration												
National Indian Gaming Commission												
Nuclear Regulatory Commission	2	1	2	1	1	1	1	2	1		1	
Securities and Exchange Commission	1						1	2			2	
State and Local Totals	**281**	**44**	**71**	**164**	**24**	**43**	**254**	**42**	**72**	**152**	**22**	**47**
	Total State		**396**	**Total Local**		**231**	**Total State**		**368**	**Total Local**		**221**

(continued)

Part I. Federal Rules Affecting State and Local Governments, 2006–2014 *(continued)*

	2012 Active, Completed, Long Term						2011 Active, Completed, Long Term					
	State			Local			State			Local		
	A	C	LT	A	C	LT	A	C	LT	A	C	LT
Department of Agriculture	39	9	0	27	6	0	44	9	2	29	8	1
Department of Commerce	16	11	2	6	2	2	19	6	2	7	3	2
Department of Defense	1	0	0	1	0	0	1	0	0	1	0	0
Department of Education	0	1	0	0	0	0	0	0	0	0	0	0
Department of Energy	6	6	0	5	5	0	13	9	0	11	5	0
Department of Health and Human Services	42	20	3	17	3	1	39	21	9	14	7	2
Department of Homeland Security	9	2	5	10	1	1	11	8	13	11	6	7
Department of Housing and Urban Development	8	3	0	9	3	0	10	0	0	10	0	0
Department of Interior	26	9	0	14	4	0	29	9	0	16	2	0
Department of Justice	9	3	3	5	3	3	11	2	2	7	2	2
Department of Labor	14	6	3	6	2	2	12	0	3	7	0	2
Department of State	2	0	0	0	0	0	2	0	0	0	0	0
Department of Transportation	8	3	3	4	2	2	9	1	3	7	0	0
Department of Treasury	18	4	3	15	2	3	22	4	0	16	4	0
Department of Veterans Affairs	2	1	0	1	0	0	3	1	0	1	0	0
Environmental Protection Agency	37	26	20	24	18	15	67	22	26	47	17	15
Architectural and Transportation Barriers Compliance Board	4	1	0	3	1	0	4	0	1	3	0	1
CPBSD*	0	0	0	0	0	0	0	1	0	0	1	0
Advisory Council on Historic Preservation	NA	NA	NA	NA	NA	NA						
Consumer Financial Protection Bureau	1	1	1	0	0	0	3					
Court Sevices/Offender Supervision, D.C.				1								
Corp. for National and Community Service	0	1	2	0	1	2	3	3	0	3	3	0
Federal Emergency Management Agency	NA	NA	NA	NA	NA	NA						
Equal Employment Opportunity Commission	3	2	0	3	2	0	3	2	0	3	2	0
General Services Administration	3	0	0	3	0	0	1	6	0	1	5	0
Gulf Coast Ecosystem Restoration Council												
National Aeronatics and Space Administation	0	0	0	0	0	0	0	0	0	0	0	0
National Archives and Records Administration	0	0	0	0	0	0	0	0	0	0	0	0
Institute of Museum and Library Services	0	1	0	0	1	0	0	0	1	0	0	1
National Endowment for the Arts	1	0	0	1	0	0						
National Endowment for the Humanities	0	0	0	0	0	0	0	0	0	0	0	0
Office of Management and Budget	0	0	0	0	0	0	0	0	0	0	0	0
Small Business Administration												
Social Security Administration	0	0	1	0	0	0	2	0	0	0	0	0
Federal Communications Commission	0	0	25	0	0	18	0	0	24	0	0	17
Federal Energy Regulatory Commission	0	0	0	0	0	0	0	0	0	0	0	0
Federal Reserve System	0	1	1	0	1	1	1	1	1	1	0	1
Federal Trade Commission	1	1	0	1	0	0	2	0	0	1	0	0
National Credit Union Administration	0	0	0	0	0	0	1	0	0	0	0	0
National Indian Gaming Commission	0	0	0	0	0	0	0	0	0	0	0	0
Nuclear Regulatory Commission	4	2	1	2	2	0	3	1	1	2	1	0
Securities and Exchange Commission	2	1	0	1	0	0	2	0	0	1	0	0
State and Local Totals	**256**	**115**	**73**	**159**	**59**	**50**	**317**	**106**	**88**	**199**	**66**	**51**
	Total State		**444**	**Total Local**		**268**	**Total State**		**511**	**Total Local**		**316**

Source: Compiled from "The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions," *Federal Register*, various years' editions, www.reginfo.gov.

*Committee for Purchase from People Who Are Blind or Severely Disabled.

2010		2009		2008		2007		2006	
State	Local	State	Local	State	Local	State	Local	State	Local
53	36	75	49	72	41	63	43	74	58
27	11	20	11	22	11	22	9	28	9
1		1	0	1	0	0	0		
		0	0	0	0	0	0	1	
26	22	23	20	27	25	19	18	12	9
86	42	71	38	69	41	83	45	70	47
35	26	39	30	33	25	37	28	39	28
8	9	2	3	2	4	1	4	3	7
28	9	30	7	41	11	37	9	37	11
21	15	16	11	15	10	17	11	14	8
20	10	27	15	17	9	20	7	13	8
1		1	0	2	0	3	0	3	
13	5	16	6	18	6	19	7	27	12
29	24	29	24	24	20	28	25	16	15
5	1	0	0	1	0	1	0	1	
125	85	101	70	104	65	119	80	132	86
3	2	3	2	2	2	2	2	1	1
1	1	1	1	1	1	2	2	2	2
4	4	5	5	5	5	6	6	7	7
6	6	5	5	2	3	3	4	3	4
9	7	9	7	10	7	8	5	8	5
		0	0			0	0		
		0	0	1	1	3	3	4	4
2	2	0	0	1	1	1	1	1	1
		0	0	1	1	1	1	1	1
		0	0			0	0		
		0	0			0	0	1	1
2		2	0	3		4	0	2	
32	23	30	20	32	20	31	20	32	19
		0	0			0	0		
1	1	0	0			0	0	1	1
2	1	3	1	1	0	1	0	2	
1		0	0	1	0	0	0	3	
		0	0			0	0		
3	1	4	2	3	1	4	1	3	1
3	3	1	1	2	2	4	3	2	1
547	**346**	**514**	**328**	**513**	**312**	**539**	**334**	**543**	**346**

Part J. The Unconstitutionality Index, 1993–2014

Year	Final Rules	Public Laws	The Index	Notices	Executive Orders	Executive Memos
1993	4,369	210	21			
1994	4,867	255	19			
1995	4,713	88	54	23,162	40	
1996	4,937	246	20	24,367	50	
1997	4,584	153	30	26,033	38	
1998	4,899	241	20	26,197	38	
1999	4,684	170	28	25,505	35	
2000	4,313	410	11	25,470	39	13
2001	4,132	108	38	24,829	67	12
2002	4,167	269	15	25,743	32	10
2003	4,148	198	21	25,419	41	14
2004	4,101	299	14	25,309	46	21
2005	3,975	161	25	25,353	27	23
2006	3,718	321	12	25,031	25	18
2007	3,595	188	19	24,476	32	16
2008	3,830	285	13	25,279	29	15
2009	3,503	125	28	24,753	44	38
2010	3,573	217	16	26,173	41	42
2011	3,807	81	47	26,161	33	19
2012	3,708	127	29	24,408	39	32
2013	3,659	72	51	24,261	24	32
2014	**3,554**	**224**	**16**	**23,970**	**34**	**25**

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Recent criticisms of the current Crain and Crain report ("The Impact of Regulatory Costs on Small Firms," see note 27) would also apply to some OMB calculations and have in the past—although, alas, critics do not present alternative and defensible total cost estimates. In particular, the Crain and Crain model for calculating costs of economic regulations using the World Bank Regulatory Quality Index has fallen under criticism by OMB and others. Earlier estimates by Crain and Hopkins would be in the same ballpark, in current dollars, even wirhout including costs of interim regulations. Moreover, current estimates do not capture tbe costs of such major initiatives as health care legislation, Dodd-Frank financial regulation, or even the earlier Sarbanes-Oxley financial rules. This author addressed some of those concerns about the SBA study in a *Forbes* column (Clyde Wayne Crews Jr., "The Cost of Government Regulation," *Forbes*, July 6, 2011, http://www.forbes.com/sites/waynecrews/2011/07/06/the-cost-of-government-regulation-the-barack-obama-cass-sunstein-urban-legend/).

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About the Author

Wayne Crews is Vice President for Policy at the Competitive Enterprise Institute (CEI). He is widely published and a contributor at Forbes.com. A frequent speaker, he has appeared at venues including the DVD Awards Showcase in Hollywood, European Commission–sponsored conferences, the National Academies, the Spanish Ministry of Justice, and the Future of Music Policy Summit. He has testified before Congress on various policy issues. Crews has been cited in dozens of law reviews and journals. His work spans regulatory reform, antitrust and competition policy, safety and environmental issues, and various information-age policy concerns.

Alongside numerous studies and articles (including the recent *The Other National Debt Crisis: How and Why Congress Must Quantify Federal Regulation*), Crews is co-editor of the books *Who Rules the Net?: Internet Governance and Jurisdiction*, and *Copy Fights: The Future of Intellectual Property in the Information Age*. He is co-author of *What's Yours Is Mine: Open Access and the Rise of Infrastructure Socialism*, and a contributing author to other books. He has written in the *Wall Street Journal*, *Chicago Tribune*, *Communications Lawyer*, *International Herald Tribune*, and other publications. He has appeared on Fox News, CNN, ABC, CNBC, and the PBS News Hour. His policy proposals have been featured prominently in the *Washington Post*, *Forbes*, and *Investor's Business Daily*.

Before coming to CEI, Crews was a scholar at the Cato Institute. Earlier, Crews was a legislative aide in the U.S. Senate, an economist at Citizens for a Sound Economy and the Food and Drug Administration, and a fellow at the Center for the Study of Public Choice at George Mason University. He holds a Master's of Business Administration from the College of William and Mary and a Bachelor's of Science from Lander College in Greenwood, South Carolina. While at Lander, he was a candidate for the South Carolina state senate.

A dad of five, he can still do a handstand on a skateboard and enjoys custom motorcycles.



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Debunking the Myths: EPA Proposal to Prohibit Conversion of Vehicles into Racecars

EPA Proposed Regulation:

Under the EPA proposed regulation, certified motor vehicles and engines and their emission control devices must remain in their certified configuration even if they are used solely for competition. Violators would be subject to the fines and penalties included in the tampering prohibitions.

SEMA's Understanding of Proposal as Confirmed by the EPA:

SEMA representatives met with EPA officials on January 20, 2016 to confirm the association's understanding of the proposed regulation. The EPA officials confirmed that the regulation would make it illegal to convert a certified motor vehicle into a vehicle to be used solely for competition. The EPA officials claimed that this had always been their interpretation of the Clean Air Act.

Myth: This proposal is not changing current law.

Congress never intended the Clean Air Act to be interpreted as giving the EPA the authority to regulate vehicles used solely for competition, regardless of whether the vehicles were once emissions-certified road vehicles. Once a vehicle is taken out of use as a road vehicle and dedicated solely to racing, it is beyond the laws which apply to road vehicles. The EPA and SEMA fundamentally disagree on this point. SEMA has cited the statutory text, legislative history, and congressional intent of the Clean Air Act, as well as 46 years of history whereby vehicles have been converted from certified road status to status as race vehicles without any objection from EPA.

Myth: The EPA is merely clarifying the law as it relates to motor vehicles and nonroad vehicles, and its proposal only affects vehicles driven on the streets.

The EPA is adding new language to the regulations. This new language states that a motor vehicle can never be modified, even if it is used solely for competition and never again used on public roads. The EPA is seeking to prohibit modifications affecting any emissions-related component, such as engines, engine control modules, intakes, exhaust systems, etc.

Myth: The EPA's proposal only affects medium- and heavy-duty vehicles.

The EPA inserted the problematic language into a rulemaking that focuses on medium- and heavy-duty vehicles, however, the rulemaking also includes a section entitled "Miscellaneous EPA Amendments." The language affecting "vehicles used solely for competition" (i.e., racecars) was a "miscellaneous EPA amendment" and would, in fact, affect all light-duty vehicles, not just trucks.

Myth: SEMA is overreacting, this will never get passed.

The EPA has issued a proposed regulation. Regulations are issued by federal agencies and not voted on by elected representatives. If the language becomes final (EPA is expected to issue a final regulation in July), then it will have the force of law and can only be challenged in federal court or overturned by Congress.

Myth: The EPA could not enforce this proposal.

The proposal would give the EPA the power to enforce against any vehicle owner that converts his or her emissions-controlled motor vehicle into a vehicle to be used solely for competition. Whether or not the EPA chooses to enforce, it would be illegal for an individual to convert their motor vehicle. Additionally, the EPA has stated that it will enforce against aftermarket companies that sell parts for use on the converted vehicles, which will limit racers' access to parts.

Myth: The EPA's proposal would not affect vehicles that have already been converted into racecars.

It is the EPA's position that they will be able to enforce against vehicles that have already been converted in the past. While the EPA has indicated that it does not currently plan on enforcing against individuals, it does plan on going after the companies supplying parts for vehicles that have already been converted. So, if you have a racecar that began life as a street car, this regulation would affect your access to parts, and leave you open to enforcement if the agency so chooses.

Fact: The EPA's proposal would not affect racecars with original emissions controls.

The EPA notes that race vehicles with original, unmodified emission controls, including the original engine configuration, engine control module, intake and exhaust components, do not violate the law. The issue is that very few competition race vehicles have been left unmodified and in a certified configuration.

Fact: The EPA's proposal would not affect purpose-built racecars, such as sprint cars, open-wheel dragsters and the cars that currently compete in NASCAR.

The EPA agrees that vehicles that were originally manufactured for racing are excluded from regulation under the Clean Air Act. However, the EPA believes this exclusion extends only to vehicles that were never certified for on-road use or issued a VIN.

Fact: The EPA's proposal will not affect the exemption for "nonroad vehicles," such as dirt bikes, ATVs, snowmobiles and boats used solely for competition.

The EPA has indicated that it will continue to allow "nonroad vehicles" (dirt bikes, ATVs, snowmobiles, boats) to be exempted from certain emissions regulations if they are used solely for competition. Distinct from its stance on motor vehicles, however, the EPA's current position on nonroad vehicles allows emissions-certified nonroad vehicles to be converted into vehicles used solely for competition.

Get the Facts for Yourself:

Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles--Phase 2, 80 Fed. Reg. 40,138 (July 13, 2015), docket no. EPA–HQ–OAR–2014–0827:

Please use the search function to locate this provision within the proposed regulation:

> **PART 86--CONTROL OF EMISSIONS FROM NEW AND IN-USE HIGHWAY VEHICLES AND ENGINES**
>
> ***
>
> **Subpart S--General Compliance Provisions for Control of Air Pollution From New and In-Use Light-Duty Vehicles, Light-Duty Trucks, and Heavy-Duty Vehicles**
>
> ***
>
> 67. Section 86.1854-12 is amended by adding paragraph (b)(5) to read as follows:
>
> § 86.1854-12 Prohibited acts.
>
> * * * * *
>
> (b) * * *
> (5) Certified motor vehicles and motor vehicle engines and their emission control devices must remain in their certified configuration even if they are used solely for competition or if they become nonroad vehicles or engines; anyone modifying a certified motor vehicle or motor vehicle engine for any reason is subject to the tampering and defeat device prohibitions of paragraph (a)(3) of this section and 42 U.S.C. 7522(a)(3).

To review SEMA's comments to the EPA proposal, go to:
http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2014-0827-1469

The Department of Energy: Under-the-Radar, Overly Burdensome

In the regulatory world, generally the Environmental Protection Agency (EPA) receives the lion's share of criticism and scrutiny. Sometimes the scrutiny is from industry and business groups, and in other instances, from progressives and environmentalists for alleged lax regulation. As much as EPA is in the headlines, the Department of Energy (DOE) is typically buried somewhere in the classifieds of the regulatory arena. After examining the data on the regulatory costs, consumer impacts, and employment, that needs to change.

Since 2007, DOE has finalized rules with $8.2 billion in annualized regulatory costs, with a net present value impact exceeding $155 billion. These are hardly trivial burdens, often unreported, and always justified by the agency since the purported benefits are said to exceed the costs. Yet, there have been few retrospective reviews analyzing whether the benefits of the energy savings exceed the costs to the manufacturer, and eventually, the higher prices to the consumer.

This study (using publicly available DOE cost-benefit analyses) examines the cumulative impact of DOE regulations since 2007, including effects on consumers, various states, and industries. It looks specifically at the industry most often targeted by DOE rules, air conditioning and heating, and determines whether a past air-conditioning rule delivered on its promised benefits. The American Action Forum (AAF) found wide disparities between DOE's projected level of product shipments versus actual figures, calling the agency's benefit figures into question.

Cumulative Burdens

Despite the lack of criticism or scrutiny from the press or Capitol Hill, DOE likely deserves just as much inquiry as EPA or any other prominent regulator. Even the Office of Information and Regulatory Affairs (OIRA) acknowledges that DOE has imposed the third-highest cost burden from 2002 to 2012, behind EPA and the Department of Transportation. Given the recent push by the Obama administration to increase efficiency across the economy, in an effort to curb emissions of greenhouse gases (GHG), the pace of DOE rules has increased substantially.

The chart below details the number of "major" DOE rules that OIRA has approved from 2007 to 2014, with the corresponding net present value (NPV)(unadjusted for inflation) published cost of all DOE measures.

Year	Major Rules	NPV Cost (in millions)
2007	2	$504
2008	2	$92
2009	5	$22,736
2010	2	$32,776
2011	4	$38,351
2012	1	$5,033
2013	2	$6,561
2014	8	$37,400
Totals:	**26**	**$143,455**

As the chart displays, DOE has imposed substantial burdens on the manufacturing sector and, ultimately, consumers who must eventually pay higher prices. The above figure even excludes two significant final rules from 2015. The agency is now averaging 3.25 major regulations annually since 2007 (compared to five a year from EPA). On an annual basis, all rulemakings (proposed and final) from the agency from 2007 to 2015 have imposed more than $9.5 billion in economic costs. This compares to an estimated $32 billion in benefits, but both figures are subject to a large amount of uncertainty on an *ex ante* basis. The eight major DOE rules approved in 2014 was a record, according to OIRA, and there does not appear to be a slowdown pending. The latest Unified Agenda outlined 11 new major rules from DOE that could be completed before 2016. For comparison, the Clinton Administration approved just six major DOE measures during its eight years in office.

Consumer Impact

Imposing $9 billion in annual economic costs since 2007 might sound like a striking headline figure, but what does that portend for the average consumer? It means, as DOE often concedes: higher prices and less choice. In 2014, AAF issued "The Consumer Price of Regulation," detailing how 36 recent regulations could increase prices for everyday Americans by more than $11,000. Although corporations are often viewed as the targets of federal rules, the costs imposed must be borne by someone, and typically, consumers pay higher prices.

Energy regulations featured prominently in last year's report and the administration routinely concedes that prices will rise from regulation. For example, in its 2011 rule requiring more efficient refrigerators, the administration noted that the average price could increase by $83. In addition, in its recent proposal for hearth products (heating equipment), the agency admitted per unit prices could escalate by $101. Here is the agency's standard language: "Customers affected by new or amended standards usually *incur higher purchase prices* and lower operating costs."

However, most of DOE's analysis presumes an average homogenous consumer who is comfortable with a higher purchase price in exchange for keeping the product long enough to reap potential energy savings. As Sofie Miller of the George Washington Regulatory Studies Center has found, however, adjusting discount rates can turn a rule with benefits into a measure with net costs for society. Due to the higher purchase price, these efficiency regulations can have regressive effects, disproportionately burdening low-income households.

Looking broadly, a sample of the ten largest DOE rules since 2009 reveals that consumers could bear $2,380 in higher prices because of regulation. Below are the largest rules with the corresponding consumer impacts and links to the agency's regulatory impact analysis:

Regulation	Annual Cost (in millions)	Price Increase
Refrigerator Efficiency Standards	$1,569	$83
Water Heater Efficiency Standards	$1,285	$464
Fluorescent Lamp Efficiency Standards II	$841	$12
Fluorescent Lamp Efficiency Standards I	$700	$3
Electric Motor Efficiency Standards	$517	$313
Walk-In Cooler Efficiency Standards	$511	$1,086

Lamp Ballast Efficiency Standards	$363	$10
Residential Furnace Fan Efficiency Standards	$358	$75
Small Electric Motor Efficiency Standards	$263	$247
Commercial Refrigerator Efficiency Standards	$261	$85
Totals:	**$6,666**	**$2,380**

At more than $2,300 in escalating prices, the demands in regulation often result in a lighter wallet for consumers. Granted, few consumers will purchase all of the products outlined above, but a hypothetical purchase of a refrigerator, furnace fan, and water heater could easily equal a regressive "regulatory tax" of more than $620. In most instances, the consumer would have no knowledge that federal regulations drove up the price of the item.

Employment Impact

Beyond the cumulative impact and higher consumer prices, there are significant impacts on industry employment. Again, this is not a new finding. DOE routinely admits that its rules could cause industry employment to decline and result in substantial outsourcing. In one recent air conditioning rulemaking, the administration wrote, "It is possible the small manufacturers will choose to leave the industry or choose to be purchased by or merged with larger market players." In another proposed rule, this one for furnaces, DOE noted conversion costs would total 18 percent of revenue for small businesses and just three percent for large businesses. As a result, some entities "may re-evaluate the cost-benefit of staying in the MHGF [mobile home gas furnaces] market." It is only because these statements are buried in hundreds of pages of regulatory analysis that their implications are not spread across the country for the public to learn. DOE essentially admits that many small entities will go out of business – and jobs will be lost -- because of a federal rule.

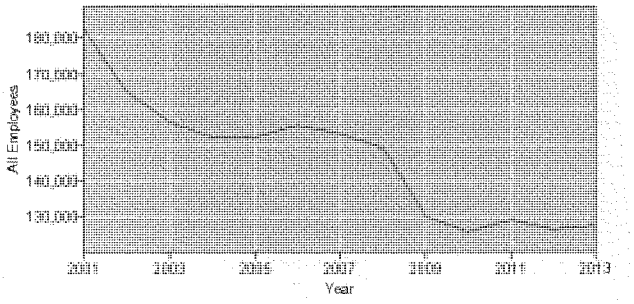
Quantifying these statements is often difficult, but occasionally, the agency will put a number to these words. In one efficiency standards rule for hearth products, DOE predicted industry employment could drop by 51 to 908 employees. This might seem like a paltry number, but consider that overall employment in the hearth industry is projected to be 1,565 employees by 2021.

In a proposed rule for commercial refrigeration equipment, the administration outlined five industry employment scenarios. The best cases result in either no job losses or moderate gains of 253 jobs. In all other possibilities, employment could decline by 3,672 jobs if "all existing production were moved outside of the United States." Indeed, outsourcing is a common theme in DOE regulatory impact analysis. And although one regulation rarely leads to 3,600 job losses immediately, DOE is keenly aware that its rules can have profound employment implications.

One theme through many of the rules highlighted here is the target industry: heating, ventilation, and air conditioning, or HVAC. This is a broad portfolio with more than 125,000 American jobs, but one that is subject to frequent DOE regulation. An examination of its employment levels during the last decade reveal that some factor, or combination of factors, has severely cut into its domestic labor totals. AAF took the following figure directly from the Bureau of Labor Statistics (BLS):

Quarterly Census of Employment and Wages

```
Series Id:  ENUUS0001053334
State:      U.S. TOTAL
Area:       U.S. TOTAL
Industry:   NAICS 3334 HVAC and commercial refrigeration equipment
Owner:      Private
Size:       All establishment sizes
Type:       All Employees
```



Since 2001, the HVAC and commercial refrigeration equipment industry has shed 55,572 jobs, or more than 30 percent of its total. Even more striking, the decline began well before the Great Recession, with substantial losses between 2001-2005, when the economy was growing. Furthermore, despite the economic recovery (albeit tepid), the industry has not witnessed a strong rebound in employment.

Undoubtedly, regulations are a factor in the employment declines. Since 2010, regulators have imposed $4 billion in final rule annualized costs on the industry. Thus, DOE imposes a "regulatory tax" on the industry of at least $1 billion each year. That's one billion dollars in new rules each year for an industry that generates $6.5 billion in annual wages for employees. Although the industry isn't writing a check for this amount, someone must pay for these burdens: employees, shareholders, or consumers through higher prices. The NPV burden for final rules since 2010 is even more staggering, at $75.6 billion for the HVAC industry.

That's hardly the end of new regulations on these companies, however. In proposed form, during the last two years, the administration projects $1.3 billion in additional annual burdens from just six new rules. On an NPV basis, this could add another $23.4 billion in costs to the industry. Tallying both final rules and measures still in their proposed form, DOE has imposed $5.3 billion in annual burdens and nearly $100 billion in NPV costs on the HVAC industry. Given the president's commitment to regulation and energy efficiency, it is likely these numbers will escalate causing a combination of lower worker pay, diminished shareholder returns, or fewer employees.

A Retrospective: Questionable Assumptions

Every administration touts the benefits of its regulatory agenda. This is typically accomplished by adding the monetized benefits of the largest major rules (measures with annualized costs or benefits exceeding $100 million) and comparing that sum to monetized costs. With a few rare exceptions, most new standards proclaim that benefits always exceed costs. However, these figures are a prospective estimate of benefits and costs. Rarely do agencies or outside scholars dig through the actual, post-implementation data to determine if the projections are accurate. For two rules, the 2001 standard to raise air conditioning efficiency by 30 percent and a 2009 conservation standard for microwaves, AAF found significant discrepancies between agency projections and actual results.

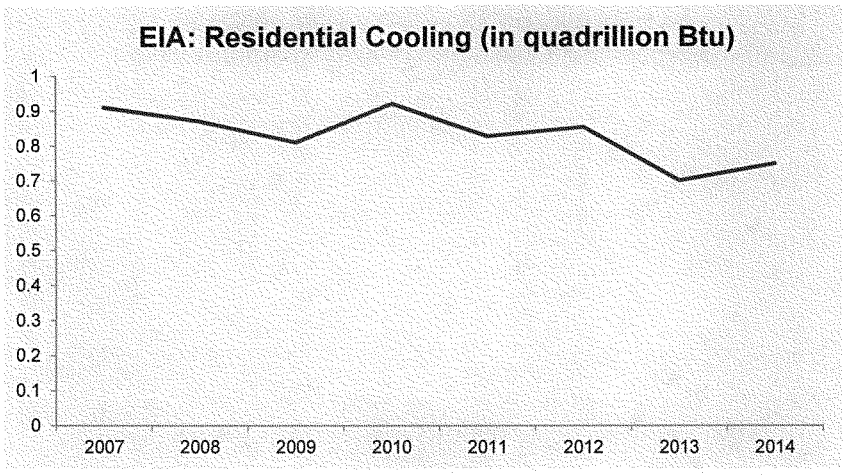
It is difficult to untangle the effect of federal regulation on the economy after implementation, which is one reason why prospective estimates are widespread and retrospective studies are relatively few. Rather than examine the macroeconomic impact of these efficiency rules, AAF examined estimates of product shipments. For example, if DOE projected 16 million shipments of new energy efficiency microwaves, but for various reasons, either because the regulation increased the price of the product or other macroeconomic forces, shipments were actually below nine million, the benefits to the economy would be far less. This is due to consumers holding their "inefficient" products longer, reducing new sales, and cutting the possible energy saving and environmental benefits of the newer, more efficient products. Regulators are fully aware that regulations raise the price of goods, incentivizing consumers to purchase fewer products, but it appears that agencies routinely discount this effect, lowering the actual benefits of regulation.

Air Conditioning Rule

The 2001 efficiency rule for air conditioners went through a winding road on its way to boosting standards by 30 percent. The original 2001 rule raised efficiency by 30 percent, but a 2002 amendment set the achievable limit at 20 percent. After court action, the more stringent standards were adopted and set for implementation in 2006 (see footnote 216).

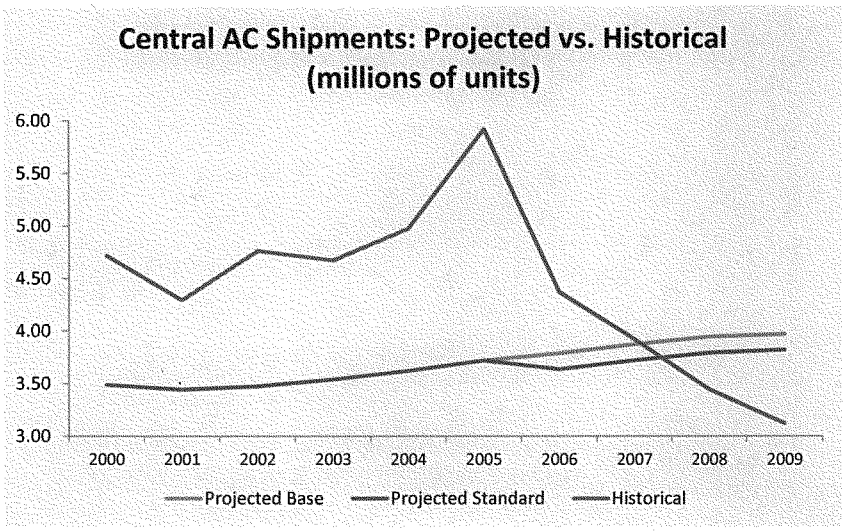
The 2006 standards claimed that they would save three quads of energy over the lifetime of the rule. Additional standards in a 2011 rule claimed to save up to 4.22 quads of energy by 2045. According to the Energy Information Administration (EIA), however, residential cooling savings have been mixed, partly because the number of newer units is lower than what the agency originally predicted.

The 2006 standards helped to create a sharp drop in the number of air conditioning shipments. The agency anticipated a slight drop of 130,000 shipments. Instead, shipments declined by more than 1.55 million, according to agency and industry estimates. Thus, the energy required for residential cooling use didn't decline as expected between 2007 and 2010; it increased. See below.



From 2007 to 2010, energy use for residential cooling increased from 0.87 quadrillion BTUs to 0.92 quadrillion BTUs, or 5.7 percent. This, despite the economic recession. For comparison, total U.S. energy use fell five percent from 2008 to 2009. During the horizon listed above, residential cooling has declined slightly, but it is difficult to attribute all of the decline to the two major regulations. It is difficult to ignore, however, an increase in residential cooling usage from 2007 to 2010 that should at least invite scrutiny about the initial benefits of the rule, especially when projected shipments fell so precipitously.

The initial DOE analysis conceded that consumers would "forgo the purchase of more efficient air conditioners and heat pumps due to their higher purchase price." The extent of this decline, and the shaky assumptions from DOE are illustrative. See below.



The data above compares DOE's analysis of its 2011 air conditioning rule to the 2006 standards. In the former, DOE included historical data on shipments of air conditioners. AAF merely compared this data to the initial projections from the earlier 2006 standards. DOE was hardly accurate with its projections. In 2005, there was a tremendous surge in purchases, the year before the new measures took effect. That year, purchases eclipsed 5.9 million, a record since 2000. On the contrary DOE initially projected just 3.7 million.

As noted, the agency predicted a slight drop in shipments when the rule was scheduled to take effect, but only a decline of 2.1 percent. What happened in reality? A decline of 26.1 percent, at a time when the average unemployment rate hovered between 4.4 and 4.8 percent. The following year, from 2006 to 2007, when the economy was still strong, shipments fell by another ten percent, compared to DOE's projection of a two percent increase in shipments. For perspective, from 2005 to 2009, the agency projected new energy efficient air conditioner shipments would increase by 2.6 percent. Instead, they declined by 2.8 million shipments, or 47.2 percent.

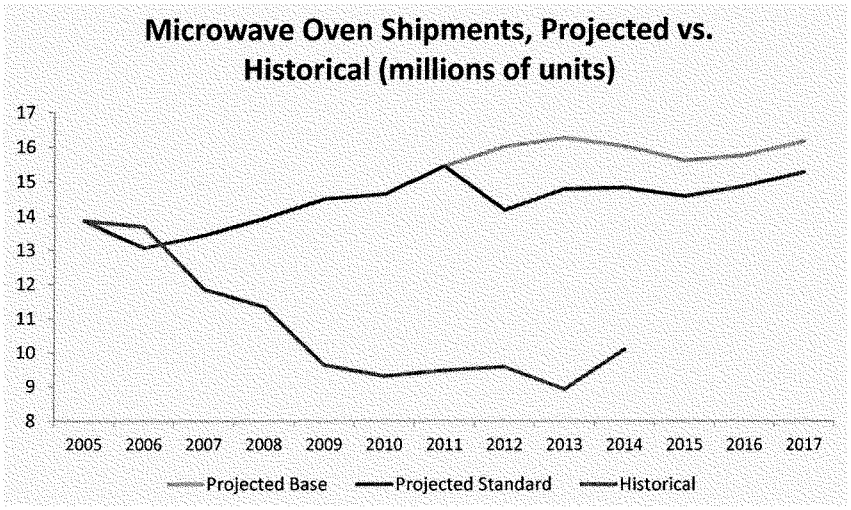
In sum, DOE projected a 2.6 percent increase in the last half of the decade and actual shipments declined by 47.2 percent. That should call into question the assumptions of one of the most prolific regulators in the nation, an agency that has added $155 billion in cumulative costs since 2007 alone. Consumers shouldn't be blamed for forgoing the purchase of more efficient, but far more expensive air conditioners. The initial DOE rule projected price increases ranging from $144 to $213, with the expectation that the average consumer would keep the new unit for 18.4 years.

What does the extreme drop in shipments mean for the overall benefits of the regulation? According to OIRA, the 2006 standards will impose $1.1 billion in annual costs and just $1.2 billion in annual benefits. Thus, it doesn't take too many erroneous assumptions for the costs to easily trump the benefits of the regulation. Take 2008 and 2009 as examples. Between those two years average shipments were 13.6 percent lower than projections. A crude way of addressing the benefits suggests that a 13 percent decline compared in shipments would yield just $1.07 billion in benefits during that time. If costs were as projected, or even 5 percent lower, then they likely exceeded benefits from 2008 to 2009. In other words, DOE's erroneous shipment projections could easily turn from a rule that barely had net benefits for society, into a regulation that imposes more costs than benefits.

Microwave Rule

In 2009, DOE finalized a rule covering various consumer products, including dishwashers, dehumidifiers, microwaves, ranges, and ovens. Although the rule's annual costs and benefits were less than $100 million and thus not economically significant, the benefit-to-cost ratio was projected to be a positive 2:1. However, for the microwave portion of the rule, DOE's initial estimates on shipments of newer, more efficient machines, were off the mark.

The follow chart compares DOE's projection of microwave oven shipments from 2006 to 2017. As detailed below, the agency's projection, compared to industry data on shipments, is drastically different.



In 2009, the year of the rule, DOE projected 14.4 million microwave shipments. On the contrary, that year there were just 9.6 million shipments, a difference of 33 percent. In 2014,

manufacturers were projected to ship 14.8 million efficient microwaves, compared to the actual amount of roughly ten million, a difference of 48 percent. Examining the history of microwave shipment projections versus reality yields an average disparity of 34 percent.

What does this mean for benefits? Although the rule didn't divide its original cost-benefit analysis among all of the product classes, it's difficult to believe the original benefit claims are true if shipments are significantly lower than projections. However, if shipments among all regulated products were 34 percent lower than DOE's original estimate, it's not difficult to believe an actual cost-benefit ratio closer to 1:1, or half of the agency's original projection.

Conclusion

Whether it's air conditioning units or microwaves, actual data on deliveries reveal that DOE incorporates several false assumptions into its estimates, significantly over-counting benefits. Beyond the agency's assumptions, there are the real consequences from the cost side of the ledger. At more than $155 billion in total costs in recent years, these burdens have a profound impact on manufacturers' employment and consumer prices. Although DOE is rarely covered in the headlines, these findings should elevate its standing as one of the most aggressive regulators in Washington.

Forbes

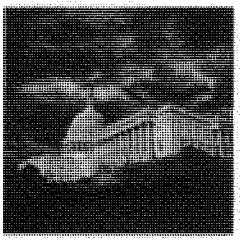
OPINION 2/23/2016 @ 8:30AM

End Game: Time Is Running Out On President Obama's Regulatory Program

President Obama plans to issue 95 economically significant regulations during his final year in office. However, according to a new report from theCongressional Research Service, any rule not published by May 16th runs the risk of being summarily overturned in 2017.

The Witching Hour

While his plans may be more ambitious than previous presidents, Presidential Obama will not be the first president to issue a flurry of "midnight regulations" on his way out the door. But as a result of an obscure law, regulatory "midnight" may arrive a full eight months before January 20, 2017.



WASHINGTON, DC – JANUARY 21, 2013: The U.S. Capitol following the inauguration of President Barack Obama. (Instagram Photo by Rob Carr/Getty Images)

Under the Congressional Review Act (CRA), congress has 60 working days after a final rule is issued to review it, and send a "joint resolution of

disapproval" to the president. Not surprisingly, presidents have been unwilling to sign disapprovals of their own regulations, so the few disapproval resolutions that have made it out of congress usually die when they reach the president's desk. For example, in the last year, President Obama has vetoed resolutions disapproving the Environmental Protection Agency's Waters of the United States rule and the National Labor Relations Board's union organizing rule.

Resetting the Clock

However, there is a window at the end of an administration when congressional resolutions of disapproval would land on the desk of the next president, reducing that veto threat. For rules issued with less than 60 working days left in the current Congress, the 60-day review clock starts over in the next Congress. According to CRS's review of the current legislative calendar, that means that the 115th Congress seated in January 2017 will have a chance to review any rule issued after May 16, 2016 . If the new Congress resolves to disapprove any of those regulations, the 45th president will be the one to sign or veto that resolution.

Since it was enacted in 1996, the CRA has only been used to overturn one regulation—an Occupational Safety and Health Administration rule aimed at addressing ergonomic injuries in the workplace. Theergonomics regulation was issued amid much controversy late enough in the Clinton Administration that the new Congress had an opportunity to review it. It sent a resolution of disapproval to President Bush, who signed it.

A Blunt Tool

The CRA is a blunt tool for dealing with last minute regulations; once a rule is disapproved, the Act prohibits an agency from issuing a regulation that is "substantially the same." Legislators may find this feature appealing for some controversial rules. However, for fine-tuning a regulation that may address shared objectives but be troubling in its details (perhaps as a result of truncated public input or rushed analysis to meet the midnight deadline), reformers may need to look to other options.

Other Regulatory Reform Options

Congress can exercise control over regulatory outcomes by limiting appropriations for enforcement, or it could issue new legislation that supersedes or overrides a regulation.

The judiciary also has a role, as the more controversial regulations are likely to be litigated in court. Furthermore, how vigorously a new administration defends those cases will influence the ultimate disposition of the regulation. For example, the next administration will likely be responsible for defending the Clean Power Plan rule, which the Supreme Court recently put on hold while theUnited States Court of Appeals for the District of Columbia Circuit hears the case.

While a new president cannot simply rescind a regulation that has already been issued without repeating the full notice-and-comment rulemaking procedure, regulations' effects can be influenced by how they are interpreted and enforced. (President Obama's approach to enforcing immigration laws are a case in point.)

In his final State of the Union speech, President Obama joked that he had "plenty" of policy proposals and promised he would "not let up until they get done." But he may be running out of time for pursuing policies through regulation. If the next congress and president are willing to use the CRA, rules completed after May 16th will be vulnerable to being overturned.

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THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

Working Paper[1]

September 2, 2015

Whose Benefits Are They, Anyway?

Examining the Benefits of Energy Efficiency Rules 2007 - 2014

Sofie E. Miller, Senior Policy Analyst[2]

The George Washington University Regulatory Studies Center

Abstract

The Energy Policy and Conservation Act authorizes the Department of Energy (DOE) to establish energy efficiency standards for consumer appliances that are both technologically feasible and economically justified, while also resulting in a "significant conservation of energy." To justify its regulations, DOE relies almost entirely on two specific types of regulatory benefits: the cost savings consumers are estimated to enjoy over the life of a more energy efficient appliance, and international benefits associated with reducing the impacts of climate change. To explore these benefits, this paper first examines the composition of benefits from energy efficiency regulations as reported by the Department of Energy over the past 10 years. It then examines arguments for and against inclusion of these benefits in regulatory impact analysis, including whether attributing large private benefits to energy efficiency rules is consistent with standard economic assumptions of consumer sovereignty, and the appropriateness of including international benefits in domestic rulemakings.

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[1] This working paper reflects the views of the author, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center's policy on research integrity is available at http://regulatorystudies.columbian.gwu.edu/policy-research-integrity.

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Introduction

In the past decade, government agencies have greatly increased the number of regulations establishing energy efficiency standards for household and commercial appliances. For example, in 2014, federal regulations setting energy efficiency standards accounted for $7.65 billion in annualized regulatory benefits.[3]

Because these regulations target common household appliances, they affect nearly all households. The Department of Energy (DOE) has recently finalized energy conservation standards for residential dishwashers,[4] microwaves,[5] clothes washers,[6] furnaces, and air conditioners,[7] appliances that most households rely on for everyday tasks. Each of these regulations increases the price of appliances in return for reducing long-term energy usage and energy bills.

Due to the scope of these rules, it is important to examine the rationale that regulators use to justify them. In the past decade especially, federal regulators have cited behavioral economics and "consumer irrationality" to justify standards that limit the amount of electricity and water that appliances can use. Because they comprise such a large proportion of overall regulatory benefits—and because they affect all households—these rules, and their justification, merit a closer look.

First, this paper examines the statutory authority underpinning DOE energy efficiency standards, and the market failures that these rules purportedly address. Second, it assesses the composition of the benefits that DOE claims result from its rules finalized between 2007 and 2014, and explains the ramifications of including private benefits and benefits to citizens of other countries in a traditional benefit-cost analysis. Third, it concludes with recommendations to policymakers who promote energy efficiency standards and analysts who seek to understand the role of consumer choice in constructing policies to reduce energy use.

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[3] Author calculation based on annualized benefit numbers reported in DOE final rules. Numbers are reported in 2010$. See *Appendix B* for detailed benefit information on final rules, and see *Appendix C* for annual benefit information on included rules.

[4] 77 FR 31917

[5] 78 FR 36315

[6] 77 FR 32307

[7] 76 FR 37407

Statutory Authority

The Energy Policy and Conservation Act of 1975 (EPCA) authorizes DOE to establish energy conservation standards for consumer appliances that are both technologically feasible and economically justified, while also resulting in a "significant conservation of energy."[8] EPCA requires DOE to establish energy and water efficiency standards for twenty different categories of covered consumer products, including refrigerators, freezers, furnaces, dishwashers, clothes dryers, televisions, faucets, and lamps.[9]

In addition to this wide range of explicitly covered appliances, EPCA also gives DOE the authority to establish energy conservation standards for "[a]ny other type of consumer product which the Secretary classifies as a covered product under subsection (b)."[10] This subsection of the Act allows the Secretary broad discretion in classifying consumer products as a "covered product" if he or she determines that:

> (A) classifying products of such type as covered products is necessary or appropriate to carry out the purposes of this Act, and
>
> (B) average annual per-household energy use by products of such type is likely to exceed 100 kilowatt-hours (or its Btu equivalent) per year.[11]

Since energy use is a function of water use in many appliances (e.g., clothes or dish washers), the statute gives the Department authority to regulate energy and water usage of a wide swath of products used every day in nearly every American household.

The EPCA also delegates authority to DOE to establish energy conservation standards for twelve classes of commercial appliances, including commercial ice machines, air conditioners, heating equipment, walk-in coolers and freezers, and commercial clothes washers.[12] Beyond these explicitly covered products, DOE also has authority to regulate "[a]ny other type of industrial equipment which the Secretary classifies as covered equipment under section 341(b)."

The number of energy efficiency standards promulgated by the federal government has increased rapidly since passage of the Energy Independence and Security Act of 2007 (EISA), which amended the EPCA to increase Corporate Average Fuel Economy (CAFE) standards and

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[8] 42 U.S.C. 6295(o)(3)(B) and 6313(d)(4) (http://www.gpo.gov/fdsys/pkg/USCODE-2013-title42/html/USCODE-2013-title42-chap77-subchapIII-partA-sec6295.htm)

[9] Energy Policy and Conservation Act, as amended, §322 (http://legcounsel.house.gov/Comps/EPCA.pdf)

[10] Energy Policy and Conservation Act, as amended, §322(a) (http://legcounsel.house.gov/Comps/EPCA.pdf)

[11] Energy Policy and Conservation Act, as amended, §322(b) (http://legcounsel.house.gov/Comps/EPCA.pdf)

[12] Energy Policy and Conservation Act, as amended, §340 (http://legcounsel.house.gov/Comps/EPCA.pdf)

efficiency standards for energy-using durables. Figure 1 below shows the number of significant energy efficiency rules finalized by DOE from 1987 – 2014.

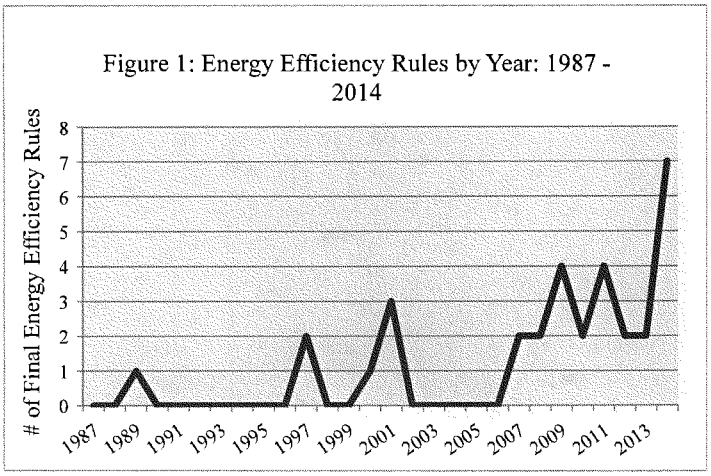


Figure 1 displays counts of energy efficiency rules finalized by the Department of Energy each year between 1987 and 2014. This figure measures only significant rules reviewed by the Office of Information and Regulatory Affairs.

Source: Mannix & Dudley, "The Limits of Irrationality as the Rationale for Regulation." *Journal of Policy Analysis and Management*, Summer 2015.

The semiannual Unified Agenda, published by the Office of Management and Budget (OMB), lists ongoing and upcoming regulations planned by agencies for the year ahead. The Spring 2015 Unified Agenda listed four energy efficiency standards from DOE in the prerule stage, twenty-one standards in the proposed rule stage, and ten in the final rule stage,[13] indicating that federal regulators do not plan to slow the promulgation of energy efficiency rules any time soon.

Market Failure

In 1993, President Clinton signed Executive Order 12866, which laid out the principles of regulation that underpin the current American regulatory system. These principles have been upheld by every president since, and were recently reinforced by President Obama's Executive

[13] These counts do not include test procedures for energy efficiency which, while integral to the promulgation of energy efficiency rules, do not in themselves establish energy conservation standards.

Order 13563. When regulating energy efficiency, DOE is required by Section 1(a) of Executive Order 12866 to identify the problem that it is attempting to solve with its regulation:

> Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people.[14]

The language of EO 12866 clearly indicates that an agency should not promulgate a regulation that is not made necessary by a failure of private markets or other compelling public need unless it is statutorily required. DOE is required by statute to issue energy efficiency standards for many residential and commercial appliances. As directed by EO 12866, in a recent rule DOE identified several problems that its efficiency rules are intended to address:

> The problems these proposed standards address are as follows:
>
> (1) There is a lack of consumer information and/or information processing capability about energy efficiency opportunities in the home appliance market.
>
> (2) There is asymmetric information (one party to a transaction has more and better information than the other) and/or high transactions costs (costs of gathering information and effecting exchanges of goods and services).
>
> (3) There are external benefits resulting from improved energy efficiency of residential furnace fans that are not captured by the users of such equipment. These benefits include externalities related to environmental protection and energy security that are not reflected in energy prices, such as reduced emissions of greenhouse gases.[15]

The types of market failure that typically are used to justify government intervention fall into one of the following categories: externalities, monopoly power, and asymmetric information. DOE's claim is that two types of market failure could potentially be addressed by setting energy efficiency standards for commercial and residential equipment.

First, energy used to power appliances results in some greenhouse gas emissions. Because the social cost of greenhouse gas emissions may not be fully represented in the price of energy, these emissions are externalities which regulatory policies could address. By this reasoning, as DOE notes in its third point above, increasing energy efficiency creates external benefits that are not otherwise internalized by consumers or businesses.

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[14] Exec. Order No. 12866, Regulatory Planning and Review, §1(a).
[15] 78 FR 64132

However, DOE's energy efficiency standards do not ultimately address this market failure. As examined later in this paper, the environmental benefits of these rules are so small relative to the private benefits, and relative to the upfront costs, that reduced externalities alone do not justify the standards. While reducing carbon emissions may be a worthwhile goal for regulation, these rules only tangentially reduce carbon emissions, and primarily focus on reduced energy expenditures by consumers[16] and businesses.

Second, DOE argues that consumers and businesses are currently choosing appliances with higher long-term energy costs than other available appliances, which may indicate that they do not have sufficient information about the energy cost savings that higher-efficiency products make possible. DOE presumes that these choices result from an information asymmetry in which consumers and businesses do not have the relevant information to purchase the appliances that suit their needs. This asymmetric information, if it exists, could be remedied by improved labeling or other types of consumer education campaigns.

However, these rules do not address information asymmetry in the marketplace by promoting labeling requirements or other standards that could improve the quality of information available to consumers, even though EPCA grants the Department broad authority to require labeling of energy-using products:

> (6) AUTHORITY TO INCLUDE ADDITIONAL PRODUCT CATEGORIES.—The Commission may, by regulation, require labeling or other disclosures in accordance with this subsection for any consumer product not specified in this subsection or section 322 if the Commission determines that labeling for the product is likely to assist consumers in making purchasing decisions.[17]

Despite this authority, and the relatively low cost of implementing labeling requirements, DOE does not rely heavily on labeling or other disclosures that would communicate potential energy savings to consumers. Instead, these rules ban products from the marketplace, which restricts choice rather than improving information.

While it does not fall into the category of a traditional market failure, the Department also intends for its rules to address consumers' lack of "information processing capability," as DOE notes in the rule text cited above. It is clear from the text of DOE's rules that the Department believes consumers are not adequately equipped to trade off upfront price increases against long-term energy savings. Overcoming this presumed consumer cognitive failure is the primary focus

[16] Miller, Sofie E. 2015. "One Discount Rate Fits All? The Regressive Effects of DOE's Energy Efficiency Rule." *Policy Perspectives* 22:40-54. http://www.policy-perspectives.org/article/view/15110/pdf_21

[17] Energy Policy and Conservation Act, as amended, §324 (http://legcounsel.house.gov/Comps/EPCA.pdf)

of DOE's energy conservation standards, rather than reducing information asymmetry or pollution externalities. By doing so, these rules primarily create "private benefits" to consumers and businesses, rather than public benefits to society at large from reducing externalities or information asymmetries.

The following sections explore how the Department justifies its energy efficiency standards, the massive regulatory benefits that DOE calculates as a result, and the assumptions on which those regulatory benefits are based. We find that the assumptions that DOE uses to formulate its analyses are not representative of the real-world tradeoffs faced by consumers, and modeling techniques that better represent consumer preferences and tradeoffs instead suggest consumers will bear large net costs.

Benefit Composition

DOE relies on two types of regulatory benefits to justify its regulations: private benefits to consumers from reduced energy expenditures, and the international benefit of reductions in emissions of CO_2. Each of these benefit types is explained in the sections below.

Private Benefits

Private benefits constitute the vast majority of benefits used to justify new energy efficiency rules for commercial and residential appliances. These "private" benefits are the cost savings consumers are estimated to enjoy over the life of a more energy efficient appliance. Because this cost saving is a benefit felt exclusively by the private consumer or business, rather than society at large, the benefits that justify DOE's energy efficiency rules are "private benefits" rather than public benefits. This is in contrast to the language of EO 12866, which instructs regulators to promulgate only such rules as are made necessary by "compelling *public* need."

This also differentiates these rules from the majority of federal regulations, which have historically relied on public benefits—such as reduced externalities—for justification. However, our analysis below finds that the private benefits of DOE's efficiency rules dwarf the anticipated public benefits, such that most of these rules would not pass a benefit-cost test if relying on externality benefits alone.

In many cases, consumers already had the option to purchase more efficient, higher-priced appliances prior to regulation, indicating that a lack of energy efficient appliances available in the market is not the impetus for these standards. However, regulators draw on the behavioral economics literature to argue that consumers fail to purchase these high-efficiency appliances due to inadequate information processing capability. In doing so, regulators overlook the

possibility that consumers may have legitimate preferences for less-efficient appliances based on household characteristics or other observable product qualities (such as size, durability, reliability, or noise level).[18] By regulating away the option for consumers to purchase less-efficient appliances, DOE is ostensibly improving consumers' choice structure by removing choices.[19]

Social Cost of Carbon

As recently as 2009, DOE did not factor the benefits of reduced carbon emissions into a complete analysis of its rules. In 2007 and 2008, DOE provided estimates of how many million metric tons of carbon dioxide (CO_2) emissions would be avoided by its rules, but the agency did not monetize these reductions. Beginning in 2009, the Department started providing a range of quantified environmental benefits for CO_2. However, it did not incorporate this range—or a midpoint—into its total benefit estimate. As DOE explains:

> DOE has chosen to continue to report these benefits separately from the net benefits of energy savings. Nothing in EPCA or in the National Environmental Policy Act (NEPA) requires that the economic value of emissions reduction be incorporated in the net present value analysis of energy savings. Unlike energy savings, the economic value of emissions reduction is not priced in the marketplace. However, DOE will consider both values when weighing the benefits and burdens of standards.[20]

In the rule cited above, which was finalized in January of 2009, DOE used $0/ton as a low-end estimate of the benefit of reducing carbon emissions, and $20/ton as a high-end value. Later in 2009, DOE formalized this process by using a social cost of carbon (SCC) to value the CO_2 emissions reductions from its efficiency standards. In a 2011 rule, DOE used an SCC value of $22.1/ton of CO2, using a 3 percent discount rate.[21] In a 2013 final rule, DOE unveiled for the first time an SCC value of $41.4/ton.[22, 23]

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[18] Dudley, Susan E. "Addendum to Public Interest Comment on the Department of Energy's Proposed Clothes Washer Efficiency Standards." Docket No. EE-RM-94-403. http://mercatus.org/sites/default/files/publication/Clothes_Washer_Standards.pdf

[19] See, for example, Hunt Allcott and Cass Sunstein. "Regulating Internalities." *Journal of Policy Analysis and Management*, Vol. 34 Issue 3 698-705.

[20] 74 FR 1114

[21] 76 FR 37413

[22] 78 FR 36315

[23] For additional information, read our comment on DOE's final rule: Dudley, Susan E., Sofie E. Miller, & Brian F. Mannix. "Public Interest Comment on Reconsideration of the Department of Energy's Final Rule: Energy Conservation Standards for Standby Mode and Off Mode for Microwave Ovens." Filed September 6, 2013.

Importantly, the social cost of carbon is calculated using the global value of reducing domestic emissions. While the costs of the standards will be borne by the American consumers and businesses that are directly affected by the rule, the reduction in carbon emissions resulting from DOE's rules is monetized based on its global, rather than domestic, value. That is, the Department weighs not only domestic but international benefits from its rules against entirely domestic costs, which swings the analysis in favor of stricter efficiency standards. Using a global perspective to calculate the benefits of reducing carbon emissions represents a dramatic shift in domestic policy, and there are many attendant problems to be considered with this methodology.[24]

Methodology

Identifying the Rules

To calculate the total benefit DOE attributes to its energy efficiency rules, we first identified final DOE regulations issued between 2004 and 2014 using the Federal Register. To identify rules that establish energy efficiency standards, we searched for "energy conservation program," the program under which DOE promulgates efficiency rules pursuant to the EPCA and EISA. Of the search results, we included in our database those rules that clearly established minimum energy efficiency standards for residential or commercial appliances. While they are also important components of the energy conservation program, rules establishing certification requirements or test procedures for appliance efficiency were not included in this examination because they do not set minimum standards for energy efficiency.

Originally, this search returned 40 energy efficiency standards promulgated by DOE. However, 15 of these final rules did not include sufficient information on benefits and costs for the purposes of this analysis, so they were excluded from consideration. Notably, most of these rules were finalized between 2004 and 2007. Because none of the final rules issued prior to 2007 included information on benefits and costs, the earliest rules examined in this analysis were finalized in 2007. While this research project was originally intended to span a decade of energy efficiency standards, these data limitations constrain this analysis to the seven years between 2007 and 2014. The rules that were excluded from this analysis are listed in Appendix D, and the rules that were included in this analysis are listed in Appendix A.

Docket I.D. EERE-BT-PET-0043.
http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/GW_RSC_DOE-EERE-BT-PET-0043.pdf

[24] Ted Gayer & W. Kip Viscusi. "Determining the Proper Scope of Climate Change Benefits." *Working Paper, the George Washington University Regulatory Studies Center.* June 3, 2014.

Counting Costs and Benefits

For each of the included rules, we recorded regulation identification number (RIN), rule title, date of publication, total benefits, total costs, private benefits, benefits from the reduction of CO_2 emissions, and the dollar years in which these data were reported. These raw data are listed in Appendix A of this paper. In each regulation examined, the costs and benefits (and the composition of those benefits) were found in the preamble of the final rule text. After tallying all relevant benefit and cost information from the selected rules, we converted all values to 2010 dollars using the Bureau of Labor Statistics' Consumer Price Index to sum the benefit and cost values. These converted dollar values are listed in Appendix B of this paper.

Due to changes over time in how agencies present their estimated costs and benefits, we use annualized costs and benefits to measure the cumulative effects of these rules. This approach has the strength of consistency over time, as each of the DOE rules examined provided annualized cost and benefit information. One weakness of this approach is that it does not convey the total costs and benefits of DOE's energy efficiency standards, but instead provides an annualized snapshot. However, this approach has the strength of data consistency, and in our judgment is the most reliable way to approach this analysis.

Costs and benefits are reported for two groups of rules. First, we report costs and benefits for all rules issued between 2007 and 2014. Second, we report costs and benefits for all rules issued after August 2009, when the DOE first began using SCC values to calculate regulatory benefits. Because the value of carbon reductions was not consistently monetized in regulatory analyses until August 31, 2009, reporting the cumulative benefit compositions for all rules between 2007 and 2014 slightly under-represents the extent of the rules' environmental impact. To address this concern, we assess the total benefit composition in addition to benefit compositions both pre- and post-policy change.

International Benefits

For some rules,[25] DOE reports both the domestic and international benefits from reducing carbon emissions. In these cases, the domestic benefits expected to result are about 7 – 23% of the worldwide values DOE emphasizes in its proposal. This is because, relying on an integrated assessment model (the FUND model), DOE would expect the direct benefit to the U.S. to be between 7 and 10% of the global benefit of CO_2 reductions. The 23% value is derived assuming

[25] The Department of Energy's Proposed Rule: *Energy Conservation Program: Energy Conservation Standards for Small, Large, and Very Large Air-Cooled Commercial Package Air Conditioning and Heating Equipment.* Proposed Sept. 30, 2014.79 FR 58947.

that benefits to the U.S. are proportional to the domestic share of global GDP, resulting in an overall 7 – 23% range.[26]

For this analysis, we rely on the total worldwide benefits reported in each of DOE's final rule preambles. We used the upper boundary of the FUND model estimates to calculate 10% of the total CO_2 benefits as accruing to the U.S., while the remaining 90% of CO_2 benefits accrue to other nations.

Findings

Benefits and Costs

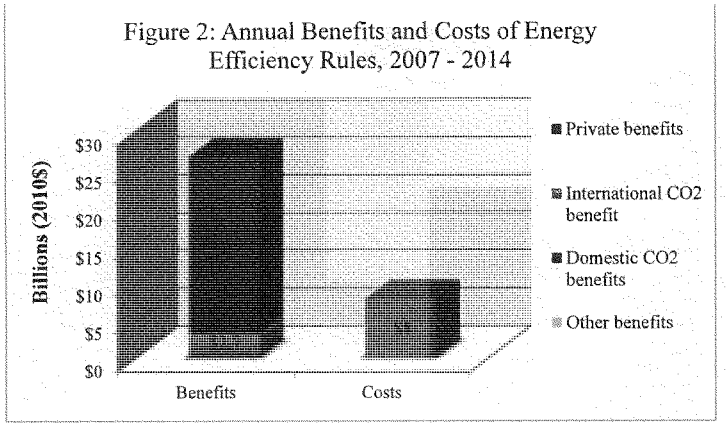
We find that according to DOE estimates, efficiency standards issued between 2007 and 2014 will result in $26.63 billion in annual benefits. $23.4 billion of these benefits are private benefits, and the remaining $3.2 billion are public benefits. The table below lists the composition of benefits DOE reports from its final efficiency rules.

Annual Benefit Composition 2007 – 2014 (2010$)	
Private benefits	$23,420,000,000
Other benefit	$147,860,000
International CO2 benefits	$2,751,000,000
Domestic CO2 benefits	$305,660,000
Total benefits*	**$26,625,700,000**

**Due to rounding, summing the individual benefits above does not add up to the total benefits. To see totals before rounding, visit Appendix B.*

For ease of comparison, these data are also presented in the figure below, and are displayed in contrast to the annualized costs of these rules.

[26] United States Government. Interagency Working Group on Social Cost of Carbon. *Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866.* http://www.epa.gov/OMS/climate/regulations/scc-tsd.pdf

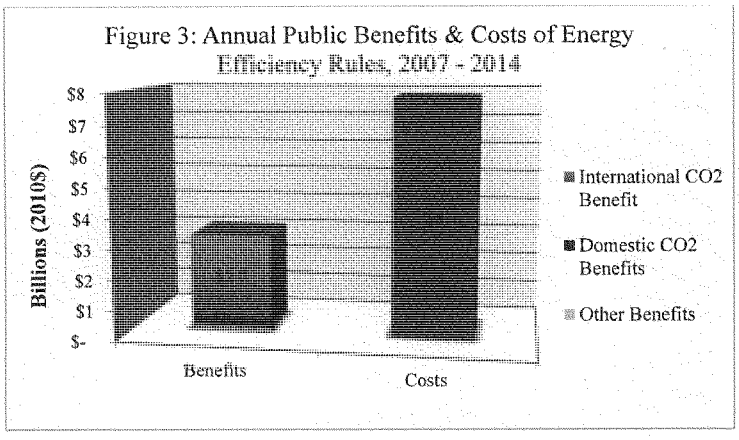


As is clear in the above chart, the reported benefits of these rules greatly outweigh the reported costs. Based on DOE's analyses, consumers can expect $18.8 billion in annual net benefits from efficiency standards. Also based on DOE's analyses, the vast majority of these benefits are private benefits enjoyed by appliance users rather than public benefits to health or the environment.

For the purpose of illustration, the following chart shows how the *public* benefits of DOE's efficiency rules compare to costs. Without the $23 billion in private benefits, the costs of these standards outweigh the public benefits by $4.6 billion (2010$) annually, indicating that these rules are not "made necessary by compelling public need" as directed by Executive Order 12866, nor are they "economically justified" as specified in the Act. Instead, the rules serve primarily to address what DOE might term a private need.

The next largest category of regulatory benefits is international benefits from CO_2 reductions, which provide $2.75 billion in annual benefits. If we limit standing to residents of the U.S., the costs of these standards outweighs the public benefits by $7.38 billion annually.[27]

[27] Domestic benefits are estimated to be 10% of the international benefits reported. See the *Methodology* section of this paper for more information on how these values were calculated.

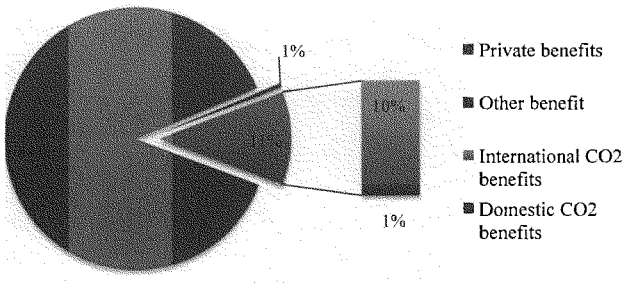


These analyses are highly sensitive to the scope and prevalence of the private benefits—and, to a lesser extent, international benefits—that DOE chooses to include in its analyses. Because of the outsized role of these benefits, careful attention should be paid to the economic theory underpinning them.

2007 - 2014

The below chart displays in percentage terms the composition of regulatory benefits from all DOE efficiency standards included in this analysis. Private benefits are the largest portion, comprising 88% of all regulatory benefits. Benefits from reducing CO_2 emissions are the next largest portion, at 11% of total benefits. However, as can be noted in the chart, 90% of these CO_2 benefits are benefits to residents of other countries.

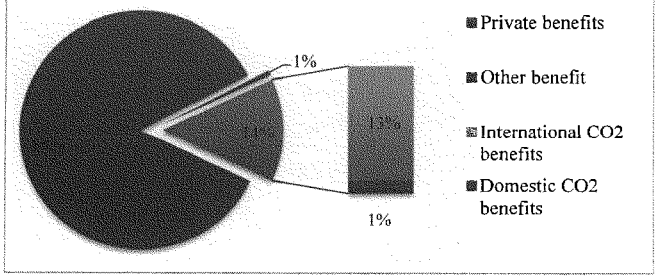
Figure 4: Composition of Energy Efficiency Rule Benefits, 2007 - 2014



2009 - 2014

DOE did not include monetized benefits of carbon reduction in its rules until August 2009. To reflect this different treatment the below chart examines the composition of regulatory benefits for rules issued after August 2009.

Figure 5: Composition of Energy Efficiency Rule Benefits, 2009 - 2014



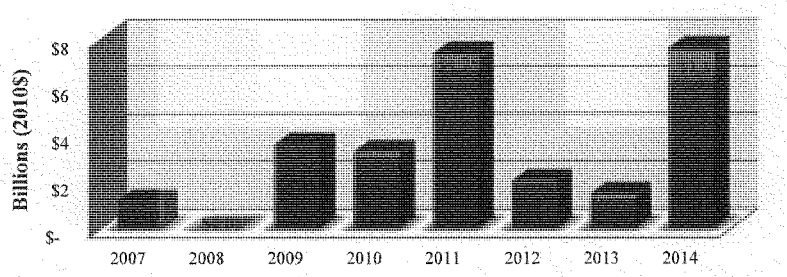
As can be seen above, the outsized role of private benefits in DOE's efficiency standards during the 2007 – 2014 time period is not primarily due to the omission of SCC benefits in early rulemakings. Even after DOE began to monetize the value of reducing carbon and NO_x emissions, private benefits still constituted the vast majority—85 percent—of the benefits of

energy efficiency standards. However, the benefit composition was still somewhat affected. Narrowing the scope of this analysis to only rules that include environmental benefits decreases the concentration of private benefits by three percentage points, from 88 percent to 85 percent of total benefits.

Annual Data

One way to view changes over time in regulatory benefits is through totaling the benefits of all efficiency rules issued per year. The below chart shows annual snapshots of DOE's estimated regulatory benefits for rules issued in each year from 2007 to 2014. The year with the lowest total benefits from energy efficiency rules was 2008, with only $6.8 million in annualized benefits (100% of which were private benefits). 2014 was the year with the highest total at $7.65 billion in annualized benefits, 79.7% of which—$6.1 billion—were private benefits. However, the year with the highest private benefit tally was 2011, with $6.55 billion in annualized private benefits (88.2% of total annualized benefits).

Figure 6: Annual Benefit Composition, 2007 - 2014



Further detail on the costs and benefits of regulations issued by year can be found in Appendix C.

Over time, the share of both international and domestic benefits from CO_2 reductions has increased consistently, rising from 0% of total benefits in 2007 and 2008 to 19% in 2014. These fluctuations generally match increases in value assigned to the SCC, although other factors are at play as well. For instance, there is also significant fluctuation in the share of private benefits, not only year to year but from rulemaking to rulemaking.

Of those rules issued post-SCC, the rule with the highest composition of private benefits is an efficiency standard for residential dishwashers published in May 2012, in which private benefits accounted for 94% of total benefits.[28] The rule with the lowest composition of private benefits was a standard for metal halide lamps published in February 2014, with only 69% of total benefits made up by private benefits.[29] For more information on the benefit composition of individual efficiency rules, turn to Appendix B.

Do Private Benefits Belong in Analyses of Energy Efficiency Rules?

Standard economic analysis of regulations relies on the concept of consumer sovereignty, and traditionally treats market participants as if they are rational actors. This allows regulators to measure potential consumer and producer surplus and infer the social value of regulatory policies. However, the private benefits we examine in this paper are a departure from the norms that have traditionally governed benefit-cost analysis.

By eliminating the option to purchase low efficiency appliances, DOE believes that its energy conservation standards create significant private benefits. But this claim is difficult to reconcile with the standard economic definition of regulatory benefits: the surplus "willingness to pay" remaining after the regulation's winners fully compensate all of the losers. As Mannix and Dudley ask in a recent article:

> How much is the average consumer willing to pay in order to be prohibited from buying, for example, an incandescent light bulb? After all, prior to the regulation, not buying the incandescent bulb is free. Why would anyone pay to have that choice imposed on them?[30]

If it were true that consumers are willing to pay to have their options restricted it would mean that, absent choice-constricting regulation, consumers are missing out on billions of dollars of benefits annually. As Gayer and Viscusi note in a recent paper:

> How can it be that consumers are leaving billions of potential economic gains on the table by not buying the most energy-efficient cars, clothes dryers, air conditioners, and light bulbs? . . . If the savings are this great, why is it that a very

[28] Energy Conservation Program: Energy Conservation Standards for Residential Dishwashers. Direct Final Rule published May 30, 2012. 77 FR 31917.

[29] Energy Conservation Program: Energy Conservation Standards for Metal Halide Lamp Fixtures. Final Rule published February 10, 2014. 79 FR 7745.

[30] Mannix, Brian F., and Susan E. Dudley. 2015. "The Limits of Irrationality as a Rationale for Regulation." *Journal of Policy Analysis and Management* Vol. 34, No. 3, page 707.

> basic informational approach cannot remedy this seemingly stunning example of completely irrational behavior? It should be quite simple to rectify decisions that are this flawed. Rather than accept the implications that consumers and firms are acting so starkly against their economic interest, a more plausible explanation is that there is something incorrect in the assumptions being made in the regulatory impact analyses.[31]

Revealed Preference

Because consumers are faced with a tradeoff between upfront costs and long-term savings when they purchase energy-using durables, these purchases provide a direct example of how consumers and businesses value present versus future consumption. Instead of taking these revealed preferences as indications of legitimate preferences, DOE argues that they reveal behavioral biases that could be resolved through regulation. In a recent final rule, DOE notes that:

> the economics literature provides a wide-ranging discussion of how consumers trade off upfront costs and energy savings in the absence of government intervention. Much of this literature attempts to explain why consumers appear to undervalue energy efficiency improvements. There is evidence that consumers undervalue future energy savings as a result of: (1) A lack of information; (2) a lack of sufficient salience of the long-term or aggregate benefits; (3) a lack of sufficient savings to warrant delaying or altering purchases; (4) excessive focus on the short term, in the form of inconsistent weighting of future energy cost savings relative to available returns on other investments; (5) computational or other difficulties associated with the evaluation of relevant tradeoffs; and (6) a divergence in incentives (for example, renter versus owner or builder versus purchaser). Other literature indicates that with less than perfect foresight and a high degree of uncertainty about the future, consumers may trade off at a higher than expected rate between current consumption and uncertain future energy cost savings. This undervaluation suggests that regulation that promotes energy efficiency can produce significant net private gains (as well as producing social gains by, for example, reducing pollution).[32]

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[31] Gayer, Ted, and Kip Viscusi. 2013 "Overriding consumer preferences with energy regulations." *Journal of Regulatory Economics* 43:248–264.

[32] 79 FR 38198

DOE presumes that its own valuation for energy efficiency is the correct one, and that consumers should make product choices based on energy savings as DOE projects and values them. The fact that consumers do not currently choose to buy efficient appliances, instead of revealing consumers' preferences for other product attributes, reveals to the Department only that consumers must "undervalue" efficiency.

Limiting Choice

In many cases, DOE's regulations do not provide consumers with new choices. Often, products meeting DOE's efficiency standards are already available in the market. As DOE states:

> DOE has concluded that the standards in this rule represent the maximum improvement in energy efficiency that is technologically feasible and economically justified, and would result in the significant conservation of energy. DOE further notes that products achieving these standard levels are already commercially available for all of the product classes covered by today's proposal.[33]

Instead of increasing product options, the efficiency standards examined in this paper typically reduce the types of products available by mandating an efficiency threshold. If, as the DOE frequently notes in its rules, appliances already meeting these efficiency standards are typically already being produced in the market, then consumers already have the option to invest in high-efficiency appliances. However, the fact that consumers choose not to purchase efficient appliances indicates that they do not value these attributes as much as the Department does.

Discounting Benefits

Because consumers receive the benefit of reduced energy or water bills over the entire estimated lifetimes of their appliances, DOE must discount these benefits to make them comparable with the upfront costs resulting from the standards. Benefits expected in the future are diminished in this calculation because people generally prefer present consumption to future consumption; that is, they have positive time preferences.[34] Discounting benefits and costs allows comparison between values occurring in different time periods by converting values to a common unit of

[33] 76 FR 37414

[34] Office of Management and Budget (OMB). 2003. "Circular A-4: Regulatory Analysis."

measurement.[35] In its analyses, DOE compares discounted benefits to discounted costs to calculate the net present value of its standards.

A very low discount rate implies that present consumption is not valued much more than future consumption, whereas a very high discount rate implies that future consumption has little value relative to present consumption. The appropriate rate by which to discount future benefits is not certain, and assuming a discount rate that is too high or too low can mischaracterize consumption preferences over time. This further complicates the calculation because a rule's total expected benefits can vary dramatically depending on the discount rate used to compare them to total expected costs. Using an inaccurate discount rate could jeopardize the economic justification of DOE's energy conservation standards.

Furthermore, consumer time preferences are far from homogenous, and can differ to such an extent that DOE's analyses may not reflect actual household effects. For example, a recent working paper from the National Bureau of Economic Research (NBER) finds that different consumer groups have vastly different discount rates for purchases of energy efficient appliances. Newell & Siikamäki find that race, education, and other household characteristics can significantly influence consumer discount rates. This is crucial because "the profitability of EE [energy efficient] investments depends fundamentally on the rate at which individuals discount future energy savings relative to the required upfront investment."[36]

In Circular A-4, the Office of Management and Budget (OMB) recommends that agencies use a default discount rates of 3 and 7 percent when measuring the benefits of public investments and regulations. While a 7 percent discount rate is appropriate because it approximates the opportunity cost of capital,[37] the 3 percent rate represents the "social rate of time preference." This discount rate approximates average saving rates using the real rate of return on long-term government debt, such as 10-year Treasury notes, and thus can act as a proxy of how consumers value future consumption against current consumption.

When benefits for DOE's efficiency rules are discounted at 3 and 7 percent, its rules result in large net private benefits for consumers. For example, using discount rates of 3 and 7 percent puts the annualized benefits of its recent furnace fans rule at $2.17 billion and $1.45 billion, respectively, a range of $720 million. This large range indicates that the discount rate used in

[35] Office of Management and Budget (OMB). 1992. "Circular A-94: Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs." Page 4.

[36] Newell, Richard G. & Juha V. Siikamäki. 2015. "Individual Time Preferences and Energy Efficiency." *National Bureau of Economic Research.* Working Paper 20969. http://www.nber.org/papers/w20969

[37] Office of Management and Budget (OMB). 2003. "Circular A-4: Regulatory Analysis." Page 33.

DOE's assessment is critically important in calculating the anticipated benefits of the regulation and in determining whether the regulation is economically justified, as required by the statute.[38]

OMB's guidance on discounting may be appropriate when evaluating government expenditures, where the typical practice is to "use a low, risk-free, discount rate because no single expenditure is likely to be more than a small part of the government's budget. But this is not true of automobiles and appliances purchased by consumers, who have budget constraints and an aversion to risks, and thus experience real costs that do not get captured by an artificially low discount rate."[39] Consumers' actual discount rates are not homogenous, either across the population or across purchase types, and more variation in DOE's assessed benefits can be seen when using actual consumer discount rates for home appliance purchases.[40]

Many studies of implicit consumer discount rates use the purchase of energy-using durables (such as air conditioners, dishwashers, and refrigerators) to measure consumer time preferences. This is because these appliances have upfront costs that customers can potentially offset with long-term energy savings, and consumers and businesses often have many available options with varying costs and levels of energy efficiency among which to choose.

Based on field studies in the literature, Frederick et al. find implicit discount rates of between 17 and 300 percent for energy-using durables.[41] The variance is so wide that DOE's use (and OMB's recommendation) of 3 and 7 percent seem unprepared to measure actual consumer benefits from energy efficiency standards. The advantage of using field studies to measure discount rates is that they examine actual marketplace behavior, and are therefore more applicable to consumer revealed preferences for energy-using durables.

This is in contrast to OMB's approach, which uses the real rate of return on long-term government debt, such as 10-year Treasury notes, to approximate consumer discount rates. While a 10 year Treasury note's interest rate is useful for analysis, it is not directly useful for understanding the tradeoffs that consumers make when purchasing durable energy-using goods. In their regression analysis, Newell & Siikamäki find that

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[38] Miller, Sofie E. 2015. "One Discount Rate Fits All? The Regressive Effects of DOE's Energy Efficiency Rule." *Policy Perspectives* 22:40-54 http://www.policy-perspectives.org/article/view/15110

[39] Mannix, Brian F., and Susan E. Dudley. 2015. "The Limits of Irrationality as a Rationale for Regulation." *Journal of Policy Analysis and Management* Vol. 34, No. 3,

[40] Miller, Sofie E. 2015. "One Discount Rate Fits All? The Regressive Effects of DOE's Energy Efficiency Rule." *Policy Perspectives* 22:40-54 http://www.policy-perspectives.org/article/view/15110

[41] Frederick, Shane, George Loewenstein, and Ted O'Donoghue. 2002. "Time Discounting and Time Preference: A Critical Review." *Journal of Economic Literature* 40 (2):384

> individual discount rates exhibit considerable heterogeneity and systematically influence household willingness to pay (WTP) for EE [energy efficiency], as measured through product choices, required payback periods, and EE tax credit claims. The relationship is statistically significant, empirically robust, and not confounded by the characteristics of the homeowner, household, and their home.[42]

DOE tallies the benefits of its energy efficiency standards by treating consumers as a homogenous group, but this does not reflect reality. If consumers do not value the appliance attributes that DOE is mandating, these rules impose huge net costs on consumers rather than benefits. Using a low discount rate to set standards effectively forces consumers to accept a very low rate of return on their investments in appliances. Many consumers, for a variety of reasons, may be in a position to earn much higher returns on other investments – such as education, or even meals, for their children. Yet DOE ignores these opportunity costs and estimates large benefits from depriving consumers of those superior investments.

Do International Benefits Belong in Analyses of Energy Efficiency Rules?

Standard benefit-cost analysis considers the benefits that accrue to people in the jurisdiction where the costs of the policy are borne.[43] For domestic regulatory policy, this has largely meant that agencies have only considered the costs and benefits felt by U.S. residents when conducting regulatory impact analyses. In the case of DOE energy efficiency rules, this would limit DOE to considering benefits to U.S. residents who purchase higher-priced appliances—however, DOE is not relying on the principles of standards benefit-cost analysis in its rulemakings. As examined above, 90% of the benefits of CO_2 emissions reductions—and 10% of total regulatory benefits of these rules—accrue to residents of other countries.

The regulatory philosophy outlined in EO 12866 specifies that rules are made necessary by public need, and the public need in question is that of the "American people" rather than public needs of the world at large.

> Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, *such as material failures of private markets to protect or improve the health*

[42] Newell, Richard G. & Juha V. Siikamäki. 2015. "Individual Time Preferences and Energy Efficiency." *National Bureau of Economic Research.* Working Paper 20969. http://www.nber.org/papers/w20969

[43] Ted Gayer & W. Kip Viscusi. "Determining the Proper Scope of Climate Change Benefits." *Working Paper, the George Washington University Regulatory Studies Center.* June 3, 2014. Page 3.

> *and safety of the public, the environment, or the well-being of the American people.*[44] (emphasis added)

Gayer and Viscusi note that Executive Order 12866 is focused on how the American regulatory system is meant to serve the American people.[45] However, this is not the only indication that agencies receive on who deserves "standing" in a benefit-cost analysis. The focus on costs and benefits to the American people has been outlined more explicitly than in EO 12866, specifically in the Office of Management and Budget's (OMB) Circular A-4, which provides the heads of executive branch agencies with important guidance on how to conduct regulatory analysis. This guidance is reformulated in OMB's Regulatory Impact Analysis Primer, which states:

> The analysis should focus on benefits and costs that accrue to citizens and residents of the United States. Where the agency chooses to evaluate a regulation that is likely to have effects beyond the borders of the United States, these effects should be reported separately.[46]

DOE's tendency to rely on worldwide benefits for CO_2 reduction violates the directive in OMB Circular A-4, reinforced in the Regulatory Impact Analysis Primer. However, DOE's reliance on benefits that accrue to foreign countries is a recent development.

Taking a Global Perspective

In its initial rulemakings incorporating a range of CO_2 benefit estimates, DOE stated the importance of using a domestic value of carbon. For example, the Department's 2009 final rule establishing efficiency standards for commercial freezer equipment emphasizes this approach:

> As DOE considers a monetary value for CO_2 emission reductions, the value should, if possible, be restricted to a representation of those costs and benefits likely to be experienced in the United States. DOE explained in the August 2008 NOPR that it expects such values would be lower than comparable global values; however, there currently are no consensus estimates for the U.S. benefits likely to result from CO_2 emission reductions. However, it is appropriate to use U.S. benefit values, where available, and not world benefit values, in its analysis.[47]

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[44] Exec. Order No. 12866, Regulatory Planning and Review, §1(a).

[45] Ted Gayer & W. Kip Viscusi. "Determining the Proper Scope of Climate Change Benefits." *Working Paper, the George Washington University Regulatory Studies Center.* June 3, 2014. Page 6.

[46] United States. Office of Management and Budget. Circular A-4, "Regulatory Impact Analysis: A Primer" (August 15, 2011) [Washington, D.C.]

[47] 74 FR 1132

Since finalizing this rule in 2009, DOE changed is stance toward incorporating international benefits into analysis of domestic regulatory policy. In its 2011 direct final rule prescribing efficiency standards for residential furnaces and air conditioners, DOE only listed global benefit totals in the preamble of the rule:

> At the time of the preparation of this notice, the most recent interagency estimates of the potential global benefits resulting from reduced CO_2 emissions in 2010, expressed in 2009$, were $4.9, $22.1, $36.3, and $67.1 per metric ton avoided. For emission reductions that occur in later years, these values grow in real terms over time. Additionally, the interagency group determined that a range of values from 7 percent to 23 percent should be used to adjust the global SCC to calculate domestic effects, *although preference is given to consideration of the global benefits of reducing CO_2 emissions.*[48] (emphasis added)

While the Department is able to calculate domestic benefits from the reduction of carbon emissions expected to result from this rule, it monetizes benefits based on the global value. The domestic benefits of carbon emissions were instead reported in chapter 16 of the Department's technical support document, rather than in the preamble to the rule itself.[49] This is opposite to OMB's guidance, which instructs agencies to report beyond-border effects separately.[50]

This change in approach requires some explanation, which DOE provided in a 2013 technical support document for its proposed commercial refrigeration standards:

> Because of the distinctive nature of the climate change problem, we center our current attention on a global measure of SCC. This approach is the same as that taken for the interim values, but it otherwise represents a departure from past practices, which tended to put greater emphasis on a domestic measure of SCC (limited to impacts of climate change experienced within U.S. borders). As a matter of law, consideration of both global and domestic values is generally permissible; the relevant statutory provisions are usually ambiguous and allow selection of either measure.[51]

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[48] 76 FR 37412

[49] Technical Support Document for the Proposed Rule, *Energy Conservation Program: Energy Conservation Standards for Residential Furnaces and Residential Central Air Conditioners and Heat Pumps.* Chapter 16: "Monetization of Emission Reduction Benefits."

[50] United States. Office of Management and Budget. Circular A-4, "Regulatory Impact Analysis: A Primer" (August 15, 2011) [Washington, D.C.]

[51] Technical Support Document for the Proposed Rule, *Energy Conservation Program: Energy Conservation Standards for Commercial Refrigeration Equipment.* Page 14A-11.

However, the question at hand is whether including global benefits is good policy, not whether it fits within an ambiguous statutory construction.[52] Gayer and Viscusi argue that limiting standing to the jurisdiction bearing the costs of regulation is more likely to generate optimal policy outcomes. They find that "there is an evident mismatch if the implementation of regulations is guided by global preferences whereas the laws governing regulatory policies are based on domestic preferences."[53]

While the costs of the DOEs standards are borne by the American consumers and businesses that are directly affected by the rule, the reduction in carbon emissions resulting from these rules is monetized based on its global, rather than domestic, value. That is, the Department weighs not only domestic but international benefits from this rule against entirely domestic costs, which swings the analysis in favor of stricter efficiency standards. With this in mind, it should be no surprise that "imposing a global perspective on benefits will increase the apparent desirability of the policy but will overstate the actual benefits to the American people."[54]

Conclusion

Agencies increasingly rely on private benefits and benefits to residents of other countries to justify regulations, despite their inconsistency with standard benefit-cost accounting. The Department of Energy routinely justifies regulations based almost entirely on the basis of these benefits, which, taken together, compose 98% of all benefits from the Department's energy efficiency standards.

As this analysis finds, private benefits comprise 88% of all regulatory benefits for energy efficiency regulations issued between 2007 and 2014. These benefits are the costs that DOE estimates consumers save long-term by purchasing more expensive, more energy efficient appliances than they otherwise would because the rule will reduce the number of options available in the market. However, these benefits are based on faulty assumptions about consumers and their preferences. If DOE's assumptions are incorrect, then consumers experience large net costs by having fewer available options that represent their diverse preferences.

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[52] Although, as Gayer & Viscusi note, statutes are not as ambiguous on this matter as agencies seem to suppose. "Determining the Proper Scope of Climate Change Benefits." *Working Paper, the George Washington University Regulatory Studies Center.* June 3, 2014. Pages 6-9.

[53] Ted Gayer & W. Kip Viscusi. "Determining the Proper Scope of Climate Change Benefits." *Working Paper, the George Washington University Regulatory Studies Center.* June 3, 2014. Page 9.

[54] Ted Gayer & W. Kip Viscusi. "Determining the Proper Scope of Climate Change Benefits." *Working Paper, the George Washington University Regulatory Studies Center.* June 3, 2014. Page 11.

Instead of increasing product options, the efficiency standards examined in this paper typically reduce the types of products available by mandating an efficiency threshold. If, as DOE frequently notes in its rules, appliances meeting these efficiency standards are typically already being produced, then consumers already have the option to invest in high-efficiency appliances. However, the fact that consumers choose not to purchase efficient appliances indicates that they do not value these attributes as much as the Department does. If consumers do not value the appliance attributes that DOE is mandating, these rules impose huge net costs on consumers rather than benefits.

Benefits from reducing CO_2 emissions comprise another 11% of total benefits from energy efficiency rules. However, DOE expects a full 90% of these CO_2 benefits will accrue to residents of other countries. Inclusion of these global benefits is inconsistent with traditional regulatory analysis for domestic policy decisions, and swings the Department's analysis in favor of stricter efficiency standards.

According to DOE estimates, efficiency standards issued between 2007 and 2014 will result in $26.63 billion in annual benefits. $23.4 billion of these benefits are private benefits, and the remaining $3.2 billion are public benefits. The reported benefits of these rules greatly outweigh the reported costs. Based on DOE's analyses, consumers can expect $18.8 billion in annual net benefits from efficiency standards. Also based on DOE's analyses, the vast majority of these benefits are private benefits enjoyed by appliance users rather than public benefits to health or the environment.

However, without the $23 billion in private benefits, the costs of these standards outweigh the public benefits by $4.6 billion (2010$) annually, indicating that these rules are not "made necessary by compelling public need" as directed by Executive Order 12866. Instead, the rules serve primarily to address consumers' and businesses' private "need" to have restricted product choice. These analyses are highly sensitive to the scope and prevalence of the private benefits—and, to a lesser extent, international benefits—that DOE chooses to include in its analyses. A different set of assumptions that rely on consumers' revealed preferences and more traditional domestic policy considerations indicates that these rules result instead in large net costs for consumers and businesses.

Appendix A

DOE Energy Efficiency Regulations and Cumulative Totals, 2007 – 2014								
RIN	Title	Date published	Benefits (annualized, 3% discount rate)	Costs (annualized, 3% discount rate)	Private benefits (annualized)	CO2 reduction benefits (annualized)	Dollar Year	Private benefit % of total
1904-AB08	Energy Conservation Program for Commercial Equipment: Distribution Transformers Energy Conservation Standards; Final Rule	10/12/2007	$904,000,000	$460,000,000	$904,000,000	238 million tons of CO2 avoided in 2010-2038	2006$	100%
1904-AA78	Energy Conservation Program for Consumer Products: Energy Conservation Standards for Residential Furnaces and Boilers	11/19/2007	$204,000,000	$40,000,000	$204,000,000	7.8 million tons of CO2 avoided in 2015-2038	2006$	100%
1904-AB44	Energy Conservation Program for Commercial and Industrial Equipment: Packaged Terminal Air Conditioner and Packaged Terminal Heat Pump Energy Conservation Standards	10/7/2008	$6,500,000	$4,100,000	$6,500,000	1.06 million tons of CO2 avoided in 2012-2042	2007$	100%
1904-AB59	Energy Conservation Program for Commercial and Industrial Equipment: Energy Conservation Standards for Commercial Ice-Cream Freezers; Self-Contained Commercial Refrigerators, Commercial Freezers, and Commercial Refrigerator-Freezers Without Doors; and Remote Condensing Commercial Refrigerators, Commercial Freezers, and Commercial Refrigerator-Freezers	1/9/2009	$253,000,000	$81,000,000	$253,000,000	$0 and $955 million (NPV 2012-2042)	2007$	100%
1904-AB49	Energy Conservation Program: Energy Conservation Standards for Certain Consumer Products (Dishwashers, Dehumidifiers, Microwave Ovens, and Electric and Gas Kitchen Ranges and Ovens) and for Certain Commercial and Industrial Equipment (Commercial Clothes Washers)	4/8/2009	$85,000,000	$28,000,000	$85,000,000	$0 to $241 million (NPV 2012-2042)	2006$	100%

1904-AA92	Energy Conservation Program: Energy Conservation Standards and Test Procedures for General Service Fluorescent Lamps and Incandescent Reflector Lamps	7/14/2009	$3,116,000,000	$531,000,000	$3,116,000,000	$7.6 to $20.6 billion (NPV 2012-2042)	2008$	100%
1904-AB58	Energy Conservation Program: Energy Conservation Standards for Refrigerated Bottled or Canned Beverage Vending Machines	8/31/2009	$59,400,000	$23,100,000	$49,100,000	$10,300,000	2008$; 2007$ used for SCC benefits	83%
1904-AB93	Energy Conservation Program: Energy Conservation Standards for Certain Consumer Products (Dishwashers, Dehumidifiers, Microwave Ovens, and Electric and Gas Kitchen Ranges and Ovens) and for Certain Commercial and Industrial Equipment (Commercial Clothes Washers)	1/8/2010	$79,000,000	$22,700,000	$72,800,000	$5,900,000	2008$	92%
1904-AB70	Energy Conservation Program: Energy Conservation Standards for Small Electric Motors	3/9/2010	$1,111,970,000	$263,700,000	$989,500,000	$115,600,000	2009$	89%
1904-AA90	Energy Conservation Program: Energy Conservation Standards for Residential Water Heaters, Direct Heating Equipment, and Pool Heaters	4/16/2010	$2,020,500,000	$1,249,300,000	$1,842,700,000	$168,600,000	2009$	91%
1904-AC06	Energy Conservation Program: Energy Conservation Standards for Residential Furnaces and Residential Central Air Conditioners and Heat Pumps[55]	6/27/2011	$1,747,850,000	$714,600,000	$1,566,800,000	$170,400,000	2009$	90%
1904-AA89	Energy Conservation Program: Energy Conservation Standards for Residential Clothes Dryers and Room Air Conditioners	8/24/2011	$442,200,000	$166,400,000	$395,300,000	$44,500,000	2009$	89%

[55] This rule includes two efficiency standards for appliances. Benefits and costs are calculated separately for the two standards, and were summed from tables I.3 and I.4 of the final rule for this analysis (76 FR 37413 – 76 FR 37414). Values from table I.4 were added to midpoint values from the ranges in table I.3.

1904-AB79	Energy Conservation Program: Energy Conservation Standards for Residential Refrigerators, Refrigerator-Freezers, and Freezers	9/15/2011	$3,703,000,000	$1,303,500,000	$3,160,000,000	$515,000,000	2009$	85%
1904-AB50	Energy Efficiency Standards for Fluorescent Lamp Ballasts	11/14/2011	$1,438,000,000	$385,000,000	$1,344,000,000	$92,000,000	2010$	93%
1904-AC64	Energy Conservation Program: Energy Conservation Standards for Residential Dishwashers	5/30/2012	$70,000,000	$44,000,000	$66,000,000	$3,900,000	2010$	94%
1904-AB90	Energy Conservation Standards for Residential Clothes Washers	5/31/2012	$1,958,000,000	$212,000,000	$1,808,000,000	$142,000,000	2010$	92%
1904-AC04	Energy Conservation Program: Energy Conservation Standards for Distribution Transformers	4/18/2013	$1,233,000,000	$282,000,000	$983,000,000	$237,000,000	2011$	80%
1904-AC07	Energy Conservation Program: Energy Conservation Standards for Standby Mode and Off Mode for Microwave Ovens	6/17/2013	$294,000,000	$66,400,000	$234,000,000	$58,400,000	2011$	80%
1904-AC00	Energy Conservation Program: Energy Conservation Standards for Metal Halide Lamp Fixtures	2/10/2014	$131,000,000	$40,000,000	$91,000,000	$38,000,000	2012$	69%
1904-AB57	Energy Conservation Program: Energy Conservation Standards for External Power Supplies	2/10/2014	$428,000,000	$162,000,000	$350,000,000	$77,000,000	2012$	82%
1904-AC19	Energy Conservation Program: Energy Conservation Standards for Commercial Refrigeration Equipment	3/28/2014	$1,152,000,000	$264,000,000	$900,000,000	$246,000,000	2012$	78%
1904-AC28	Energy Conservation Program: Energy Conservation Standards for Commercial and Industrial Electric Motors	5/29/2014	$2,696,000,000	$621,000,000	$2,048,000,000	$614,000,000	2013$	76%
1904-AB86	Energy Conservation Program: Energy Conservation Standards for Walk-In Coolers and Freezers	6/3/2014	$1,371,000,000	$528,000,000	$1,064,000,000	$287,000,000	2013$	78%
1904-AC22	Energy Conservation Program for Consumer Products: Energy Conservation Standards for Residential Furnace Fans	7/3/2014	$2,328,000,000	$355,000,000	$2,010,000,000	$312,000,000	2013$	86%
1904-AC77	Energy Conservation Program: Energy Conservation Standards for Commercial Clothes Washers	12/15/2014	$38,000,000	$30,000	$30,000,000	$7,000,000	2013$	79%

Total Benefit Composition	$26,869,420,000	$7,846,830,000	$23,572,700,000	$3,144,600,000	87.73%
	Total Benefits	Total Cost	Total Private Benefits	Total CO_2 Benefits	Private Benefits as % of Total

Appendix B

DOE Energy Efficiency Regulations and Cumulative Totals, 2007 – 2014 (2010$)							
RIN	Title	Date published	Benefits (annualized, 3% discount rate)	Costs (annualized, 3% discount rate)	Private benefits (annualized)	CO_2 reduction benefits (annualized)	Private benefit % of total
1904-AB08	Energy Conservation Program for Commercial Equipment: Distribution Transformers Energy Conservation Standards; Final Rule	10/12/2007	$977,790,790	$497,548,410	$977,790,790	238 million tons of CO_2 avoided in 2010-2038	100%
1904-AA78	Energy Conservation Program for Consumer Products: Energy Conservation Standards for Residential Furnaces and Boilers	11/19/2007	$220,651,900	$43,265,080	$220,651,900	7.8 million tons of CO_2 avoided in 2015-2038	100%
1904-AB44	Energy Conservation Program for Commercial and Industrial Equipment: Packaged Terminal Air Conditioner and Packaged Terminal Heat Pump Energy Conservation Standards	10/7/2008	$6,835,876	$4,311,860	$6,835,876	1.06 million tons of CO_2 avoided in 2012-2042	100%
1904-AB59	Energy Conservation Program for Commercial and Industrial Equipment: Energy Conservation Standards for Commercial Ice-Cream Freezers; Self-Contained Commercial Refrigerators, Commercial Freezers, and Commercial Refrigerator-Freezers Without Doors; and Remote Condensing Commercial Refrigerators, Commercial Freezers, and Commercial Refrigerator-Freezers	1/9/2009	$266,073,290	$85,185,520	$266,073,290	$0 and $1 billion (NPV 2012-2042)	100%

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1904-AB49	Energy Conservation Program: Energy Conservation Standards for Certain Consumer Products (Dishwashers, Dehumidifiers, Microwave Ovens, and Electric and Gas Kitchen Ranges and Ovens) and for Certain Commercial and Industrial Equipment (Commercial Clothes Washers)	4/8/2009	$91,938,290	$30,285,560	$91,938,290	$0 to $261 million (NPV 2012-2042)	100%
1904-AA92	Energy Conservation Program: Energy Conservation Standards and Test Procedures for General Service Fluorescent Lamps and Incandescent Reflector Lamps	7/14/2009	$3,155,843,140	$537,789,700	$3,155,843,140	$7.7 to $20.9 billion (NPV 2012-2042)	100%
1904-AB58	Energy Conservation Program: Energy Conservation Standards for Refrigerated Bottled or Canned Beverage Vending Machines	8/31/2009	$60,159,530	$23,395,370	$49,727,820	$10,832,230	83%
1904-AB93	Energy Conservation Program: Energy Conservation Standards for Certain Consumer Products (Dishwashers, Dehumidifiers, Microwave Ovens, and Electric and Gas Kitchen Ranges and Ovens) and for Certain Commercial and Industrial Equipment (Commercial Clothes Washers)	1/8/2010	$80,010,140	$22,990,260	$73,730,870	$5,975,442	92%
1904-AB70	Energy Conservation Program: Energy Conservation Standards for Small Electric Motors	3/9/2010	$1,130,209,380	$268,025,410	$1,005,730,540	$117,496,160	89%
1904-AA90	Energy Conservation Program: Energy Conservation Standards for Residential Water Heaters, Direct Heating Equipment, and Pool Heaters	4/16/2010	$2,053,641,790	$1,269,791,970	$1,872,925,380	$171,365,510	91%
1904-AC06	Energy Conservation Program: Energy Conservation Standards for Residential Furnaces and Residential Central Air Conditioners and Heat Pumps[56]	6/27/2011	$1,776,519,570	$726,321,420	$1,592,499,850	$173,195,030	90%
1904-AA89	Energy Conservation Program: Energy Conservation Standards for Residential Clothes Dryers and Room Air Conditioners	8/24/2011	$449,453,300	$169,129,420	$401,784,010	$45,229,920	89%

[56] This rule includes two efficiency standards for appliances. Benefits and costs are calculated separately for the two standards, and were summed from tables I.3 and I.4 of the final rule for this analysis (76 FR 37413 – 76 FR 37414). Values from table I.4 were added to midpoint values from the ranges in table I.3.

1904-AB79	Energy Conservation Program: Energy Conservation Standards for Residential Refrigerators, Refrigerator-Freezers, and Freezers	9/15/2011	$3,763,739,440	$1,324,881,000	$3,211,832,740	$523,447,420	85%
1904-AB50	Energy Efficiency Standards for Fluorescent Lamp Ballasts	11/14/2011	$1,438,000,000	$385,000,000	$1,344,000,000	$92,000,000	93%
1904-AC64	Energy Conservation Program: Energy Conservation Standards for Residential Dishwashers	5/30/2012	$70,000,000	$44,000,000	$66,000,000	$3,900,000	94%
1904-AB90	Energy Conservation Standards for Residential Clothes Washers	5/31/2012	$1,958,000,000	$212,000,000	$1,808,000,000	$142,000,000	92%
1904-AC04	Energy Conservation Program: Energy Conservation Standards for Distribution Transformers	4/18/2013	$1,195,270,930	$273,370,970	$952,920,780	$229,747,940	80%
1904-AC07	Energy Conservation Program: Energy Conservation Standards for Standby Mode and Off Mode for Microwave Ovens	6/17/2013	$285,003,770	$64,368,200	$226,839,740	$56,612,990	80%
1904-AC00	Energy Conservation Program: Energy Conservation Standards for Metal Halide Lamp Fixtures	2/10/2014	$124,416,740	$37,989,840	$86,426,890	$36,090,350	69%
1904-AB57	Energy Conservation Program: Energy Conservation Standards for External Power Supplies	2/10/2014	$406,491,320	$153,858,860	$332,411,130	$73,130,450	82%
1904-AC19	Energy Conservation Program: Energy Conservation Standards for Commercial Refrigeration Equipment	3/28/2014	$1,094,107,480	$250,732,960	$854,771,470	$233,637,530	78%
1904-AC28	Energy Conservation Program: Energy Conservation Standards for Commercial and Industrial Electric Motors	5/29/2014	$2,523,551,450	$581,277,990	$1,917,000,510	$574,725,740	76%
1904-AB86	Energy Conservation Program: Energy Conservation Standards for Walk-In Coolers and Freezers	6/3/2014	$1,283,304,540	$494,226,690	$995,941,670	$268,642,160	78%
1904-AC22	Energy Conservation Program for Consumer Products: Energy Conservation Standards for Residential Furnace Fans	7/3/2014	$2,179,090,420	$332,292,570	$1,881,431,170	$292,043,050	86%
1904-AC77	Energy Conservation Program: Energy Conservation Standards for Commercial Clothes Washers	12/15/2014	$35,569,350	$28,082	$28,081,060	$6,552,248	79%

Total Benefit Composition	$26,625,672,436	$7,832,067,142	$23,421,188,916	$3,056,624,170	87.96%
	Total Benefits	Total Cost	Total Private Benefits	Total CO_2 Benefits	Private Benefits as % of Total

Appendix C

DOE Energy Efficiency Regulations Annual Benefit Composition, 2007 – 2014 (2010$)					
Year	**Total Benefit**	**Total Cost**	**Private Benefit**	**CO_2 Reduction Benefit**	**Private Benefit % of Total**
2007	$1,198,442,690	$540,813,490	$1,198,442,690	-	100%
2008	$6,835,876	$4,311,860	$6,835,876	-	100%
2009	$3,574,014,250	$676,656,150	$3,563,582,540	$10,832,230	99.7%
2010	$3,263,861,310	$1,560,807,640	$2,952,386,790	$294,837,112	90.5%
2011	$7,427,712,310	$2,605,331,840	$6,550,116,600	$833,872,370	88.2%
2012	$2,028,000,000	$256,000,000	$1,874,000,000	$145,900,000	92.4%

2013	$1,480,274,700	$337,739,170	$1,179,760,520	$286,360,930	79.7%
2014	$7,646,531,300	$1,850,406,992	$6,096,063,900	$1,484,821,528	79.7%

Appendix D

DOE Energy Efficiency Regulations Lacking Sufficient Analysis for Inclusion (2004 – 2013)				
Agency	RIN	Rule Title	Published Date	Cause for Exclusion
DOE	1904-AB46	Energy Conservation Program for Consumer Products; Central Air Conditioners and Heat Pumps Energy Conservation Standards	8/17/2004	No analysis
DOE	1904-AA95	Energy Efficiency Program for Certain Commercial and Industrial Equipment: Test Procedures and Efficiency Standards for Commercial Water Heaters, Hot Water Supply Boilers and Unfired Hot Water Storage Tanks	10/21/2004	No analysis
DOE	1904-AA96	Energy Efficiency Program for Certain Commercial and Industrial Equipment: Test Procedures and Efficiency Standards for Commercial Warm Air Furnaces; General Provisions for Commercial Heating, Air Conditioning and Water Heating Equipment; Energy Efficiency Provisions for Electric Motors	10/21/2004	No analysis
DOE	1904-AB02	Energy Efficiency Program for Certain Commercial and Industrial Equipment: Test Procedures and Efficiency	10/21/2004	No analysis

		Standards for Commercial Packaged Boilers		
DOE	1904-AA97	Energy Efficiency Program for Certain Commercial and Industrial Equipment: Test Procedures and Efficiency Standards for Commercial Air Conditioners and Heat Pumps	10/21/2004	No analysis
DOE	1904-AB54	Energy Conservation Standards for Certain Consumer Products and Commercial and Industrial Equipment	10/18/2005	No analysis
DOE	1904-AB13	Energy Conservation Standards for New Federal Commercial and Multi-Family High-Rise Residential Buildings and New Federal Low-Rise Residential Buildings	12/4/2006	No analysis
DOE	1904-AB16 1904-AB17 1904-AB44	Energy Efficiency Program for Certain Commercial and Industrial Equipment: Efficiency Standards for Commercial Heating, Air-Conditioning, and Water-Heating Equipment	3/7/2007	No analysis
DOE	1904-AB74	Energy Conservation Standards for Certain Consumer Products and Commercial and Industrial Equipment	3/23/2009	No analysis
DOE	1904-AB83	Energy Conservation Program for Certain Industrial Equipment: Energy Conservation Standards and Test Procedures for Commercial Heating, Air-Conditioning, and Water-Heating Equipment	7/22/2009	Insufficient analysis
DOE	1904-AB85	Energy Conservation Program: Test Procedures for Walk-In Coolers and Walk-In Freezers	4/15/2011	No analysis
DOE	1904-AC41	Energy Efficiency Design Standards for New Federal Commercial and Multi-Family High-Rise Residential Buildings and New Federal Low-Rise Residential Buildings	8/10/2011	No analysis
DOE	1904-AB57	Energy Conservation Program: Energy Conservation Standards for Certain External Power Supplies	9/19/2011	No analysis
DOE	1904-AC56	Energy Conservation Program: Energy Conservation Standards for Direct Heating Equipment	11/18/2011	No analysis

DOE	1904-AC47	Energy Conservation Program for Certain Industrial Equipment: Energy Conservation Standards and Test Procedures for Commercial Heating, Air-Conditioning, and Water-Heating Equipment	5/16/2012	Insufficient analysis
DOE	1904-AD08	Energy Conservation Program: Energy Conservation Standards for Certain Consumer Products and Commercial and Industrial Equipment	10/23/2013	No analysis

Statement of the U.S. Chamber of Commerce

ON: Hearing on Midnight Regulations and Executive Branch Overreach

TO: U.S. House Science, Space, & Technology Committee

DATE: February 10, 2016

1615 H Street NW | Washington, DC | 20062

The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

"Midnight Regulations: Examining Executive Branch Overreach"

Statement of William L. Kovacs
Senior Vice President, Environment, Technology & Regulatory Affairs
U.S. Chamber of Commerce

February 10, 2016

Chairman Smith, Ranking Member Johnson and distinguished Members of the Committee, my name is William L. Kovacs and I am senior vice president for Environment, Technology and Regulatory Affairs at the U.S. Chamber of Commerce. This statement describes the Chamber's perspective on the topic of Midnight Regulations. Our members are hurt by poorly-drafted Midnight Regulations. Although the Obama administration recently directed agencies to prioritize rulemakings now in order to avoid Midnight Regulations, history is an indicator that such proclamations fail to stem the flow of last-minute rules.[1]

The term "Midnight Regulations" did not enter the country's political vocabulary until the Carter administration but presidents have saddled their successors with last minute executive actions ever since John Adams' appointment of judges before the inauguration of Thomas Jefferson.[2] Midnight regulations are nothing new, have been adopted by both political parties, and are the result of a need for structural regulatory reform.

This testimony will examine in detail an example of dysfunctional rulemaking which stemmed from a Midnight Regulation—the Utility MACT rule—as well as recommend solutions to prevent poor quality Midnight Regulations such as the Regulatory Accountability Act ("RAA"), the Sunshine for Regulations and Regulatory Decrees and Settlements Act, and the Require Evaluation before Implementing Executive Wishlists Act ("REVIEW Act").

I. THE ROOT CAUSE OF FAULTY MIDNIGHT REGULATIONS

A complex society needs regulations. As U.S. Chamber President and CEO Thomas Donohue has said, "[b]usiness has long recognized the need for sensible regulations to ensure workplace safety, guarantee worker rights, and protect public health."[3] As they endeavor to regulate more and more facets of American society, federal agencies must operate in an even-handed fashion, be open with the public, and follow the directives of Congress.

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[1] CHERYL BOLEN, "To Avoid Midnight Regulations in 2016, Obama Tells Agencies to Set Priorities Now," *Bloomberg BNA* (Feb. 12, 2016) *available at* http://www.bna.com/avoid-midnight-regulations-n17179923030/

[2] Elizabeth Kolbert, "Midnight Hour," *The New* Yorker (Nov. 24, 2008) *available at* http://www.newyorker.com/magazine/2008/11/24/midnight-hour

[3] Remarks of Thomas Donohue before the Des Moines Rotary Club, Des Moines, Iowa (October 7, 2010) at 3.

Preserving transparency and the ability of Congress to manage federal agencies has been a continuing challenge since the Interstate Commerce Commission, was created in 1887. Prior to 1935 and the creation of the *Federal Register*,[4] every agency published its own new regulations and there was no central repository for interested parties to monitor. Moreover, agencies were not required to take public comment on their proposed rules and respond to those comments in the rulemaking record until 1946, when Congress enacted the landmark Administrative Procedure Act (APA), which established a uniform rulemaking process, citizen participation, procedural transparency, and standards for judicial challenges to agency rulemaking actions. The root causes of faulty Midnight Regulations, especially those which have a high-impact on the economy, can be traced to inadequate notice-and-comment and transparency by agencies, overly-generous court deference to agency decisions, and sue and settle agreements between agencies and activists.

A. The Administrative Procedure Act and Rulemakings

Enacted in the wake of the New Deal's vast expansion of federal authority and the government's assumption of extensive control over the U.S. economy in order to fight World War II, the Administrative Procedure Act (APA) has been called "the bill of rights for the new regulatory state."[5] One commenter has noted that the APA expressed the nation's decision in 1946 to "permit extensive government, but to restrain agencies' unfettered exercise of their regulatory powers."[6]

The APA was written as a compromise that allows agencies to use informal "notice and comment rulemaking"—an agency only has to publish a notice of a proposed rule, allow some opportunity for public comment, and respond to any public comments when the agency finalizes the rule. Courts that evaluate those rulemaking decisions use a relaxed standard of review, and defer to agencies' technical expertise. The APA's compromise "struck between promoting individuals' rights and maintaining agencies' policy-making flexibility,"[7] actually makes it relatively easy for agencies to issue new rules that more often than not will be upheld by the courts.

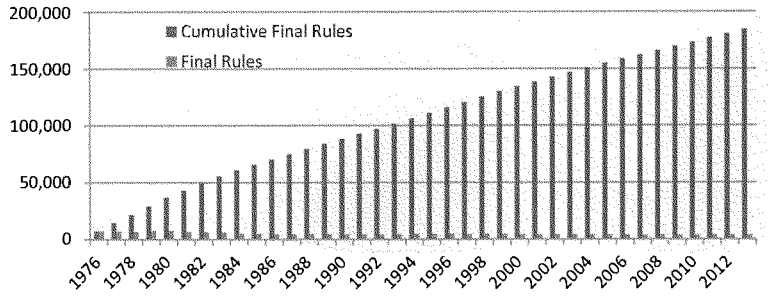
Each year, federal agencies churn out thousands of new regulations. For the vast majority of these rulemakings, the APA process has worked very well. Most of the thousands of small rules that agencies propose each year receive little or no public comment and require no procedural effort beyond publishing notices in the *Federal Register*. The ease with which agencies can write new rules helps explain

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[4] Federal Register Act of 1935, 44 U.S.C. Chapter 15. The first *Federal Register* notice was published on March 14, 1936.
[5] Shepherd, G., *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 Northwestern University Law Review 1557, 1558 (1996).
[6] *See id.* at 1559.
[7] *Id.* at 1558.

how agencies could collectively issue almost 200,000 final rules over a 36-year period, as illustrated below.

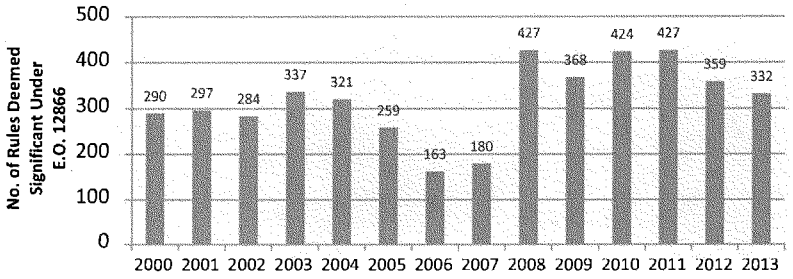
Cumulative Federal Rules Since 1976



Source: *Federal Register*

Despite the historic success of the APA in managing small, "run-of-the-mill" rulemakings, the ordinary notice-and-comment rulemaking process has become less and less capable of handling today's most extensive and complex regulatory actions.

Significant Final Rules: 2000–2013



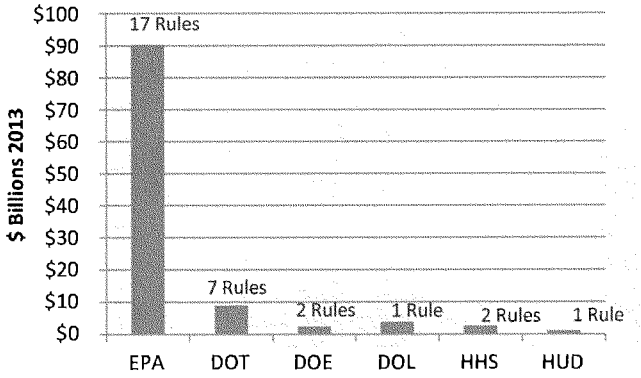
Source: *Federal Register*

Of all the significant rules issued each year, as shown above, only a tiny handful impose **$1 billion or more** each year in regulatory costs. In 2011, for example, seven proposed rules had compliance price tags of $1 billion or more.[8] The

[8] Letter from President Obama to Speaker Boehner (August 20, 2011), Appendix "Proposed Regulations from Executive Branch Agencies with Cost Estimates of $1 Billion or More." The seven rules: EPA, Reconsideration of the 2008 Ozone NAAQS ($19-90 billion), EPA, Utility MACT ($10 billion), EPA, Boiler MACT ($3 billion), EPA, Coal Ash Rule ($0.6-1.2 billion), DOT, Federal Motor Vehicle Safety Standard – Rear-View Mirrors ($2 billion), DOT, Hours of Service On-Board Recorders/Recordkeeping ($2 billion), and DOT, Hours of Service (1 billion).

Chamber's analysis of the agencies' *own* economic data identifies the rules that carry the largest nationwide cost and regulatory burden.

Rules Costing More Than $1 Billion by Agency
2000–2013



Sources: EPA rules from agency RIAs; other agencies' rules from OMB *Draft 2013 and Draft 2014 Reports to Congress on Costs and Benefits of Regulations.*

The data shows that from 2000 to 2013, a total of **30** rules from Executive Branch agencies, each with a cost of more than **$1 billion** per year, are now imposing nearly **$110 billion** each year on the U.S. economy.[9] Significantly, EPA not only issued more of these rules than all the other agencies combined, the 17 EPA rules collectively imposed **82.5%** of all the monetized compliance costs. While the high cost of these rules is important, these rules are typically also highly complex and burdensome. The rules are far more intrusive than smaller rules and have the potential to have profound effects (often unintentional) on fundamental sectors of our national economy (e.g., energy, financial institutions, healthcare, education, and the Internet).

[9] Independent regulatory agencies (e.g. the Federal Communications Commission (FCC), Securities and Exchange Commission (SEC), and Commodities Futures Trading Commission (CFTC)) are not subject to Executive branch oversight by the Office of Management and Budget (OMB) and do not routinely perform regulatory impact analysis (RIAs) as directed by OMB Circular A-4 guidance on cost-benefit analysis. Consequently, even in the cases when independent regulatory agencies estimate the costs and benefits of their regulations, they generally do not adhere to the standards established and enforced by OMB and the cost estimates are often not complete or comparable.

B. The APA Notice and Comment Process Does Not Work For Billion-Dollar-Plus Rulemakings

One might assume that, because of their importance, agencies would proceed especially carefully when they prepare billion- and multibillion-dollar per year rules. An agency would be expected to try to understand how a massive new rule will affect specific regulated industries and the communities where those industries are located. Unfortunately, however, this is very often not the case. Time and time again, informal notice-and-comment rulemaking procedures have proven insufficient to afford interested parties and the public adequate information about the most significant, complex, and costly proposed rules, or adequate time to give useful feedback to the agency in question.

For the most costly and important new rules, informal rulemaking procedures are simply not adequate because of the following factors:

- ***Agencies make unproven factual assumptions.*** Recent rulemakings have been grounded entirely on assumptions that are speculative and highly likely to be false (e.g., 65% of ozone emission reductions, according to EPA's own Regulatory Impact Analysis for its proposed ozone standards, are estimated to come from unknown controls[10]). The ordinary notice-and-comment rulemaking process gives stakeholders virtually no real opportunity to disprove these assumptions, because agencies only have to show that they have considered an adverse comment and are essentially free to disregard it.

- ***The public (and very often the agency itself) does not have enough information to fully understand how a rule will work in real life.*** Federal agencies frequently fail to grasp the impact that a large new regulation – added to prior rules and those of ***other agencies*** – have on businesses, communities, and the economy as a whole.

- ***30-, 60-, or 90-day comment periods are too short to allow stakeholders to develop detailed comments about complex or opaque proposed rules.*** By the time a full analysis of a rule's impact can be completed, the rule is final and has already taken effect. As noted previously, the Clinton administration provided no public comment its final decision to list power plants as a source of hazardous air pollution.

- ***The information agencies rely upon is often of poor quality, or is not verifiable.*** Agencies often rely on data that is difficult to obtain or verify

[10] NERA Economic Consulting, "Economic Impacts of a 65 ppb National Ambient Air Quality Standard for Ozone," February 2015, *available at* www.nam.org/ozone. (Study and estimates based on data from the EPA's Regulatory Impact Analysis of the Proposed Revision to the National Ambient Air Quality Standards for Ground-Level Ozone, pp. ES-8, ES-9 (November 2014)).

independently, that is based on too few data points, or was developed using improper methodology.

- ***Agencies are required by law to consider the impacts a new rule will have on regulated entities,[11] but these reviews are limited, rushed, or ignored altogether.*** Agencies have to take shortcuts to meet tight rulemaking deadlines, and often do not complete the analyses necessary to know how to develop a rule that accomplishes its purpose without inflicting unnecessary harm.

C. Unwarranted *Chevron* Deference From Courts Can Vest Agencies With Excessive Power to Make National Policy

Chevron deference allows faulty Midnight Regulations to survive judicial review. Judicial interpretations of the U.S. Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("Chevron") has played an important role in the expansion of federal agencies' regulatory missions and claimed authority. "Under *Chevron* . . . if a statute is unambiguous the statute governs; if, however, Congress' silence or ambiguity has 'left a gap for the agency to fill,' courts must defer to the agency's interpretation as long as it is 'a permissible construction of the statute.'"[12]

Agencies invoke *Chevron* to aggrandize their regulatory power, claiming (often wrongly) that Congress vested them with policy-making power through alleged "ambiguities" in statutes. Unfortunately, some lower courts have been willing to play along, finding so-called "gaps" in statutes where Congress did not intend them. The deference afforded some agencies by some courts diminishes the ability of both Congress and the courts to effectively oversee agency action.

The result is that poorly conceived and poorly drafted rules too often survive legal challenges and take effect. If Congress desires to regain even minimal control over agencies, the scope of *Chevron* deference must be clearly delineated and limited.

II. A Recent Example of Dysfunctional Midnight Regulations—The Utility MACT Rule

The Environmental Protection Agency's ("EPA") Utility MACT rule exemplifies a dysfunctional administrative process, which traces its roots to a midnight regulation imposed in late 2000 and involved four presidential

[11] *See, e.g.*, Executive Order 12,866 (1993) (requiring interagency economic review of "major rules" that are likely to have an annual effect on the U.S. economy of $100 million or more); Regulatory Flexibility Act, 5 U.S.C. § 601, *et seq.* (requiring federal agencies to consider the impact their proposed rules will have on small businesses and small governments). Independent agencies such as FCC, SEC, CFTC, and OCC are not bound by this Executive Order.

[12] Stinson v. United States, 508 U.S. 36, 44 (1993).

administrations. Although the United States Supreme Court held in *Michigan v. EPA* that the EPA failed to consider costs in its decision to regulate mercury emissions from power plants,[13] energy companies were required to sink the bulk of compliance costs and close facilities before the Court came to a decision on the merits.[14]

A. Early Regulation of Mercury as an Air Pollutant

EPA first regulated mercury as an air pollutant in the early 1970s;[15] however, it lacked any clear jurisdiction to consider regulation of power plant emissions until amendments were made to the Clean Air Act ("CAA") in 1990. In the 1990 amendments, during the George H.W. Bush administration, Congress directed EPA in Section 112 of the CAA to undertake a number of studies on the *hazards to public health reasonably anticipated to occur as a result of emissions by electric utilities*, including the rate and health effects of mercury emissions and the control technologies required for their reduction[16]

B. Clinton Administration Midnight Regulation

In September 1992 during the waning months of the George H.W. Bush administration, following this Congressional guidance, EPA decided not to include certain power plants in its list of Hazardous Air Pollutant Sources. Instead, the Agency decided to wait for completion of the studies before making a determination about how it would regulate mercury. The Natural Resources Defense Council ("NRDC") and other environmental groups responded by filing a lawsuit seeking review of that decision with the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") ("1992 mercury lawsuit").[17] EPA initially entered into a settlement agreement with NRDC in October of 1994, but did not fully finalize the terms until approximately April of 1998.

Under the settlement agreement, the Agency promised to determine whether regulation of mercury from power plants was appropriate and necessary. If it determined that regulation was appropriate, the settlement required the Agency to promulgate regulations under an expedited schedule.

EPA did not make this determination until approximately 36 hours after the Supreme Court's decision in *Bush v. Gore,* which would lead to a change in party control of the White House in a mere month.[18] Without opportunity for additional

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[13] *Michigan v. EPA*, 57 U.S. ___ (2015).
[14] Rich Heidorn, Jr., "MATS Challenge Too Late for Targeted Coal Plants," *RTO Insider* (Mar. 30, 2015) *available at* http://www.rtoinsider.com/epa-mats-coal-plants-14043.
[15] "Air Pollution and Control: List of Hazardous Air Pollutants," *Federal Register* 36 (March 31, 1971): 5931.
[16] Clean Air Act § 112(n)(a)(A), (B).
[17] Petition for Review, *Natural Resources Defense Council, Inc. v. U.S. EPA, et al.* (D.C. Cir. September 14, 1992) (No. 92-1415).
[18] *Bush v. Gore*, 531 U.S. 98 (2000).

public comment on its decision,[19] on December 14, 2000, the Agency found that mercury emissions from power plants presented a hazard to human health.[20] Both the 1997 mercury report[21] and the 1998 mercury study[22] raised the need for further study of the underlying data. This decision by EPA to regulate power plants ignored EPA's own recommendations that further study and review be undertaken.

EPA's 2000 determination declared power plants to be the largest domestic source of mercury emissions, that those emissions present a significant hazard to public health and the environment, and that reducing emissions from electric utilities is an important step in eliminating what the Agency considers a health hazard.[23] The Agency concluded, as a result, that regulation of mercury emissions from electric utilities was both appropriate and necessary.[24]

C. George W. Bush Clean Air Mercury Rule ("CAMR")

Under the George W. Bush administration, in 2005 EPA reversed course and issued a finding that it was neither appropriate nor necessary to regulate electric utilities under Section 112 of the CAA and removed coal- and oil-fired power plants from its Section 112(C) list of sources of hazardous air pollutants.[25] Also, EPA concluded that it was inappropriate to regulate these power plants under Section 112 because it was also promulgating a new rule, the Clean Air Mercury Rule ("CAMR"), which it claimed would "result in levels of utility [mercury] emissions that do not result in hazards to the public."[26] Three years later, the D.C. Circuit vacated CAMR and overruled EPA's Section 112 delisting of power plants for failing to meet certain procedural requirements. [27]

D. The Obama Administration's Mercury Air Toxics ("MATS") Rule

Just before President George W. Bush left office, in December 2008, environmental advocacy groups sued EPA, seeking to compel the agency to issue maximum achievable control technology ("MACT") air quality standards for hazardous air pollutants from power plants.[28] Under the Obama administration, EPA lodged a proposed consent decree.[29] The intervenor in the case, representing the

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[19] As part of the fact finding process, EPA solicited information on the regulation of mercury from the public but did not provide an opportunity for comment on the Agency's ultimate determination.
[20] "Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units," *Federal Register* 65 (December 14, 2000): 79825.
[21] "Mercury Study Report to Congress," *EPA 452/R-97-003* (December 1997): Page 3-26.
[22] "Study of Hazardous Air Pollutant Emissions from Electric Utility Steam Generating Units—Final Report to Congress," *EPA-453/R-98-004a* (February 1998): Page ES-16.
[23] 65 *Federal Register* 79830.
[24] *Id.*
[25] "Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units and the Removal of Coal- and Oil-Fired Electric Utility Steam Generating Units from Section 112(C) List," 70 *Federal Register* (March 29, 2005): 15,994.
[26] Brief for Petitions, *Michigan v. EPA* (D.C. Cir. January 2015)(Nos. 14-46, 14-47, 14-49) at 10-11.
[27] *New Jersey v. EPA*, 517 F.3d 574, 581-82 (D.C. Cir. 2008).
[28] *American Nurses Ass'n v. Jackson*, No. 1:08-cv-02198 (RMC) (D.D.C.), filed December 18, 2008.
[29] *American Nurses Ass'n*, Defendants Notice of Lodging of Proposed Consent Decree (Oct. 22, 2009).

utility industry, argued that MACT standards such as those proposed by EPA were not required by the CAA.[30]

Utility MACT (also known as the Mercury Air Toxics Standard, or MATS) is a prime example of EPA taking actions, in the wake of a sue and settle agreement, that were not mandated by the CAA. Ironically, even in this situation, where an affected party was able to intervene, EPA and the advocacy group did not notify or consult with them about the proposed consent decree. Moreover, even though the District Court for the District of Columbia expressed some concern about the intervenor being excluded from the settlement negations, the court still approved the decree in the lawsuit.[31] In the final year of President Obama's first term, EPA released in the *Federal Register* the extremely expensive Utility MACT Rule, which EPA was not previously required to issue, which was estimated to cost $9.6 billion annually by 2015.[32] In 2015, the Supreme Court struck down the MATS Rule because of EPA's failure to consider costs in determining the appropriateness of regulating mercury emissions from power plants.[33] Unfortunately, in the three years between the release of the MATS rule and the Court's decision on the merits, the economic damage had been done to the economy via already-invested compliance costs and power plant closures.

III. Hiding the Impacts—EPA's Misleading Utility MACT Cost and Benefit Analyses

A. EPA's Use of Co-Benefits

In the Supreme Court's decision to overrule EPA's MATS Rule, Justice Scalia noted the EPA's use of "ancillary" or co-benefits of PM2.5 reductions that were used by EPA to justify the MATS Rule.[34] In fact during oral arguments in *Michigan v. EPA*, Chief Justice John Roberts went so far as to question the legitimacy of EPA's usage of co-benefits.[35]

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[30] *American Nurses Ass'n*, Motion of Defendant-Intervenor Utility Air Regulatory Group for Summary Judgment (June 24, 2009) (Defendant-Intervenors argued that the proposed consent decree improperly limited the government's discretion because it required EPA to find that MACT standards under section 112(d) of the Clean Air Act were required, rather than issuing less burdensome standards or no standards at all).

[31] *American Nurses Ass'n v. Jackson*, No. 1:08-cv-02198 (RMC), 2010 WL 1506913 (D.D.C Apr. 15, 2010).

[32] "National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units," 77 *Federal Register* (Feb. 16, 2012): 9304, 9306; *see also* Letter form President Barack Obama to Speak John Boehner (August 30, 2011), Appendix "Proposed Regulations from Executive Agencies with Cost Estimates of $1 Billion or More."

[33] *Michigan v. EPA*, 57 U.S. ___ (2015).

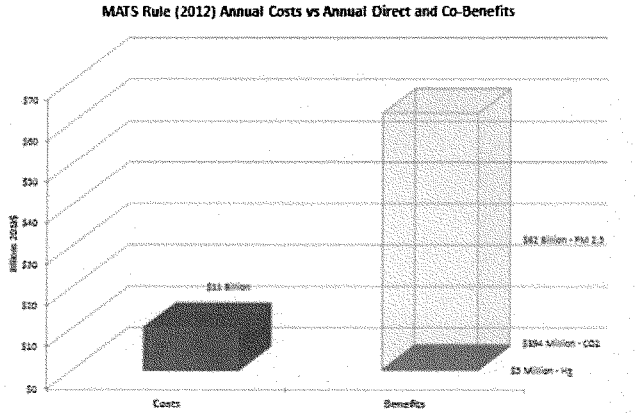
[34] *Id.*

[35] Transcript, *Michigan v. EPA*, at 64 (Mar. 25, 2015).

The first step in a well-functioning rulemaking process is for the agency to clearly tell the public which pollutant (or pollutants) it is trying to reduce and what value those targeted reductions will have to the public. The EPA in recent years has obscured important, basic information to the general public. This pattern consists of the agency first claiming it intends to regulate one (or more) specific pollutants. The EPA then writes a proposed rule that has extremely high costs, but is offset by even higher calculated benefits and so-called "co-benefits."

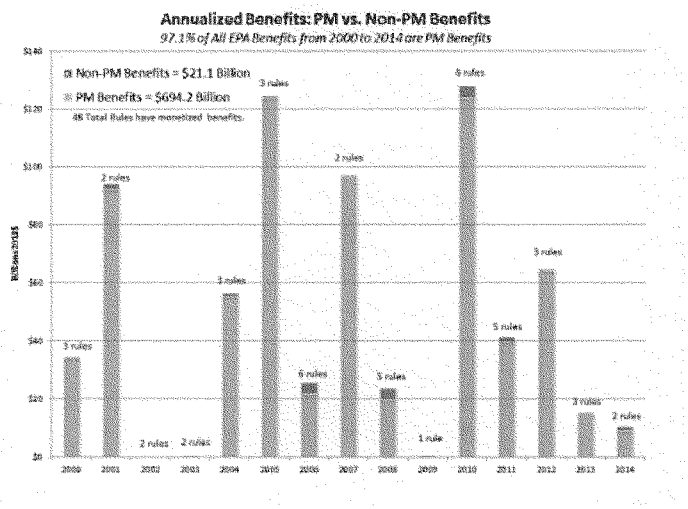
What the agency fails to tell the public is that almost all of the rule's calculated benefits actually come from purely incidental reductions in only one pollutant—fine particulate matter ("PM2.5"). The EPA has relied on estimated PM2.5 reductions in almost every major CAA rulemaking since 2000, and for one important reason: the calculated co-benefit of each ton of PM2.5 is so high that the agency can always rely upon PM2.5 reductions to "show" that any enormously costly rule has benefits that far outweigh its costs.

For instance, the 2012 MATS rule was widely touted by the EPA and the environmental advocacy groups as a powerful and essential tool to reduce mercury from power plants. The agency estimated that the rule's $10.6 billion price tag was more than justified by at least $60 billion in new health benefits. What EPA did not explain, however, was that the calculated benefits of mercury reductions from the rule are only about **$4 to 6 million**. As the chart below shows, 99.4% of the estimated benefits come from reductions in PM2.5—a pollutant that is already well controlled by its own National Ambient Air Quality Standard ("NAAQS").



The MATS rule's reliance on co-benefits is in no way unique. On the contrary, they illustrate how the EPA chooses to obscure the true costs and benefits of its rules. Indeed, the Chamber evaluated all EPA rules issued between 2000 and 2014 which

contained an RIA and found that 97.1% of all calculated benefits actually come from estimated PM2.5 reduction benefits.[36] According to a recent report by the Congressional Research Service (CRS), "co-benefits" associated with reductions in PM2.5 emissions accounted for more than half the benefits used to justify 21 out of 28 of the EPA's economically significant regulations promulgated from 2004-2011.[37] In other words, relying on PM 2.5 co-benefits, and according to CRS, 75% of the major regulations cannot be justified.



B. The Need for Cost-per-ton Metrics in Recent EPA Rulemakings

EPA informed the public that it issued the 2012 MATS rule for coal- and oil-fired utility boilers to directly address mercury emissions. EPA has estimated that the MATS rule will reduce mercury emissions from U.S. power plants from about 26 tons in 2010 to an estimated 9 tons by 2016.[38]

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[36] The Chamber examined all EPA regulations from 2000 through 2014 for which the agency prepared an RIA or other economic analysis. The findings of this analysis (see Charting Federal Costs and Benefits) revealed that for the 48 rules for which EPA estimated monetized benefits, 97.1% of the total value of those benefits came from a single pollutant, fine particulate matter or PM2.5. The source of the data for the Chamber study was EPA RIAs for cost-benefit analyses and Federal Register notices for regulatory preamble text.

[37] Mem. Form James E. McCarthy, CRS, to House Committee on Science, Space, and Technology Subcommittee on Energy and Environment ("House Subcommittee"), at 3 (Oct. 5, 2011), App. To Letter form House Subcommittees to Cass R. Sunstein, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget (Nov. 15, 2011) (hereinafter referred to as "CRS 2011 Report").

[38] Total mercury emissions have fallen from about 250 tons in 1990 to about 100 tons in 2010. Over that period, mercury from power plants declined from 59 tons in 1990 to about 26 tons in 2010. Data from "2008 National Emissions Inventory: Review, Analysis, and Highlights" U.S. EPA, Office of Air Quality Planning and Standards (May 2013) *available at* http://www.epa.gov/ttn/chief/net/2008report.pdf.

The 2012 MATS rule is a more stringent version of the finalized, but never-implemented, 2005 CAMR.[39] The MATS rule that replaced CAMR costs $10.6 billion annually, 106 times as much as CAMR costs each year.

In developing the 2005 CAMR, EPA clearly disclosed the cost for each pound of mercury that would be reduced. The public had the information enabling it to agree or disagree with the agency's choice.

By contrast, in developing the 2012 MATS rule, EPA simply presented the public with one aggregated cost of the rule and one aggregated estimate of benefits, as if all costs and benefits could be ascribed to mercury reductions. The value of the MATS mercury reductions should have been judged by comparing its additional costs of the CAMR with the value of its extra mercury reductions. Table 1 below compares the cost-per-ton of the three control technologies and the reductions in targeted pollutants that EPA estimates the rule produces. [40]

Table 1: Cost-per-ton(lb) of Targeted Pollutants

Pollutant	CAMR	MATS
Mercury (2013$/lb)	$45,500	$82,100
SO2 (2013$/ton)	$1,200	$3,900
PM2.5 (2013$/ton)	Not estimated	$21,000

But EPA did not allow the public to compare regulatory costs. Instead, the agency led the public to believe it was producing a rule that create tens of billions of dollars of health benefits from mercury reductions, when in reality it created yet another PM2.5 control rule.

The chart below compares CAMR and MATS emissions reductions and their cost-effectiveness. In addition to nearly doubling the cost-per-pound of mercury compared with CAMR, the MATS rule also has a high cost-per-ton of PM2.5 that EPA did not disclose to the public. In July 1997, President Clinton issued a Presidential Memorandum instructing EPA to keep the implementation costs for the final 1997 Ozone and PM2.5 NAAQS standards below $10,000 per ton.[41]

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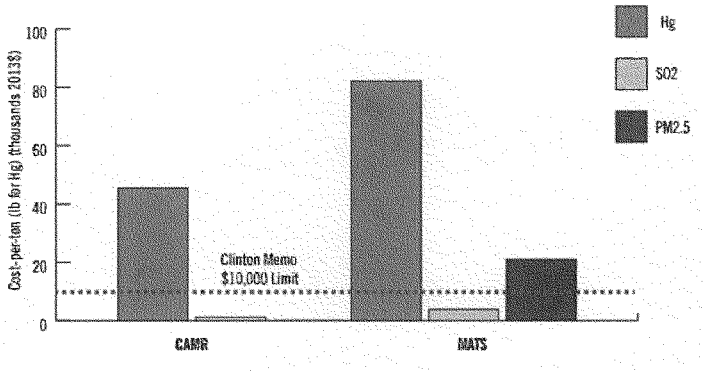
[39] 70 Fed. Reg. 28,606 (May 18, 2005)

[40] In 2005 EPA did not estimated the cost-per-ton of PM2.5 reductions from the CAMR rule because PM2.5 reductions were no the focus of the rule. Additionally, virtually all of the PM2.5 reductions EPA takes credit for in the MATS are actually SO2. However, EPA is able to claim higher benefits from PM2.5 reductions from SO2 reductions, so the agency has shifted to a policy of translating SO2 into PM2.5 to justify greater reductions with higher benefits estimates.

[41] White House Memorandum to the Administrator of the Environmental Protection Agency, "Implementation of Revised Air Quality Standards for Ozone and Particulate Matter" (July 16, 1997).

Cost-per-ton of Emissions Reductions

The 2005 CAMR Rule vs. the 2012 MATS Rule



In the CAMR rule EPA claimed incidental reductions of SO2 as co-benefits because they were achieved as a side effect by installing the mercury emissions controls. In the MATS rule, EPA required additional costly controls to further reduce SO2, and then claimed most of the SO2 reductions as PM2.5 reductions because it could inflate the value of the claimed health benefits further by doing so.

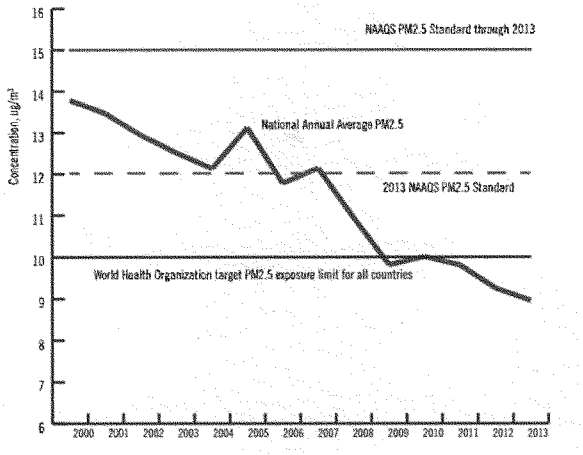
This clearly demonstrates the need for increased transparency in EPA rulemaking. More than 99% of the benefits EPA attributes to MATS are PM2.5 benefits, a pollutant that is already adequately controlled by a separate NAAQS.

Fine particulate matter in the United States has been steadily declining such that current average atmospheric levels for most Americans are well below the levels in virtually every other country.[42]

[42] *See* WHO Country Profiles (http://www.who.int/countries/en/).

PM2.5 Air Quality, 2000 to 2013

33% Decrease in National Annual Average PM2.5 Levels



To accomplished needed transparency and accountability in its regulatory decision-making, the EPA needs to:

- Return to its former policy of telling the public exactly what pollutants are being targeted by each regulation;
- Return to its former policy of telling the public how much the reductions in those targeted pollutants will cost;
- Inform the public how much the targeted pollutant(s) will actually be reduced, and how those specific reductions will benefit the public;
- Move away from relying on inflated benefits estimated purely for incidental "co-benefits" like PM2.5 reductions; and
- EPA should resume its practice of providing detailed discussions of regulatory alternatives and cost-per-ton.
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For the American public to have confidence that EPA is choosing the "right" level of regulatory protection, the EPA needs to provide more information about why it ultimately chose one level of stringency in a final rule over other alternatives available to it.

IV. LEGISLATIVE RECOMMENDATIONS

A. The Regulatory Accountability Act Requires More Extensive Rulemaking Procedures for the Most Important New Federal Rules

A modernized APA is needed to restore the kinds of checks and balances on federal agency action that the 1946 APA—the "bill of rights" for the regulatory state—intended to provide the American people. While HSGAC has primary jurisdiction over how the agency conducts its rulemaking activity, the Judiciary Committee has a huge stake in getting the rulemaking process right because poorly written rules flood the federal judicial system as judges are asked to do the job that agencies should. The Regulatory Accountability Act of 2015 would address this deficiency. The legislation would put balance and accountability back into the federal rulemaking process, without undercutting vital public safety and health protections. The bill focuses on the process agencies must use when they write the most important new regulations. The Regulatory Accountability Act would achieve these important goals by:

- Defining "high-impact" rules as a way to distinguish the 1-3 rulemakings each year that would impose more than $1 billion a year in compliance costs.

- Giving the public an earlier opportunity to participate in shaping the most costly regulations ***before*** they are proposed in the *Federal Register*. At least 90 days prior to the time the rule is proposed, the agency must provide the public with a written statement of the problem to be addressed, as well as the data and evidence that supports the regulatory action. The agency must accept public comments on the proposal.

- Requiring agencies (including independent agencies) to select the least costly regulatory alternative that achieves the regulatory objective, unless the agency can demonstrate that a more costly alternative is necessary to protect public health, safety, or welfare.

- Requiring agencies to consider the cumulative impacts of regulations and the collateral impacts their rules will have on businesses and job creation.

- Allowing stakeholders to hold agencies accountable for complying with the Information Quality Act.[43] The public would also have the opportunity to seek to correct data that does not meet IQA standards.

[43] Public Law 106-554, Section 515 (2001); 67 Fed. Reg. 8,452 (Feb. 22, 2002).

- Providing for on-the-record administrative hearings for the 1-3 most costly rules each year to verify that the proposed rule is fully thought out and well-supported by good scientific and economic data.

- Requiring agencies to be better-prepared before they propose a costly new rule. It requires agencies to justify the need for the rule and show that their proposal is actually the best alternative. Although agencies often resist undertaking this detailed degree of preparation, making them "do their homework" produces a better rule that is more likely to survive judicial challenge.

- Restricting agencies' use of "interim final" regulations, where the public has no opportunity to comment before a regulation takes effect.

The Regulatory Accountability Act would require federal agencies do a better job of explaining the rationale for new rules and being more open and transparent when they write those rules. The Act simply requires additional process to ensure a better rulemaking product; it does ***not*** compel any particular rulemaking outcome. The Act would bring the Administrative Procedure Act of 1946 into the modern era.

The Regulatory Accountability Act passed the House of Representatives on January 13, 2015 by a vote of 250-175.

B. The Require Evaluation before Implementing Executive Wishlists Act (Review Act)

On August 4, 2015, the REVIEW Act was introduced in the House as H.R. 3438 and in the Senate as S. 1927. The bill would require federal agencies to postpone the effective date of a rule which costs the economy more than $1 billion annually pending judicial review. This would prevent a situation much like the Utility MACT rule in which companies had either already shut down power plants or heavily invested in compliance costs in the three years between finalization of the rule and the Supreme Court's decision in *Michigan v. EPA*.[44] EPA Administrator Gina McCarthy herself publicly acknowledged that EPA had substantively accomplished its goals through the MATS rule whether it was deemed legal or not.[45] The REVIEW Act would prevent agencies from imposing massive costs on industry and jobs through rules which are eventually invalidated by the courts.

C. The Sunshine for Regulatory Decrees and Settlements Act

On February 4, 2015, the Sunshine for Regulatory Decrees and Settlements Act of 2015 was introduced in the House as H.R. 712 and in the Senate as S. 378. The

[44] http://thehill.com/policy/energy-environment/246423-supreme-court-overturns-epa-air-pollution-rule/
[45] *Id.*

bill would (1) require agencies to give notice when they receive notices of intent to sue from private parties, (2) afford affected parties an opportunity to intervene *prior to the filing* of the consent decree or settlement with a court, and (3) publish notice of a proposed decree or settlement in the *Federal Register*, and take (and respond to) public comments at least 60 days prior to the filing of the decree or settlement. The bill would also require agencies to do a better job showing that a proposed agreement is consistent with the law and in the public interest.

H.R. 712 passed the House on January 7, 2016 by a vote of 241-173.

V. CONCLUSION

The goal of a regulatory agency should be to produce regulations that implement the intent of Congress in the most efficient way possible. Congress has provided significant guidance as to the analysis agencies must undertake to achieve Congressional intent. The analysis required by Congress requires the agency to make decisions based on fact, sound science and economic reality.

The Administrative Procedure Act of 1946 certainly served its purpose of initially injecting transparency and accountability in our nation's regulatory structure. Since then, however, forces such as special interests utilizing sue-and-settle tactics and the emergence of *Chevron* deference to agency decisions have been contributing to dysfunctional rulemaking and resultant, expensive litigation.

Many of the recommendations identified above can be traced back to bipartisan proposals which were made during the 1930s regulatory reform debates. Unlike the 1940's-era struggle over the New Deal that lead to the APA, today's regulatory reform efforts such as the Regulatory Accountability Act are not about partisan attacks but about establishing good governance. ***Structural regulatory reforms are critical in the case of Midnight Regulations because there is little incentive for agency accountability at the end of a presidential term, especially if there is a known change in partisan control.*** The fact that the Bush Administration EPA failed to reverse the Clinton administration's midnight mercury determination evidences that once a rule is finalized, it can be difficult to change policy except through the courts or Congress which can take years and subject the U.S. economy to massive compliance costs. An effective regulatory system is one under which agencies operate efficiently, transparently, and accountably. We propose that such good governance and effective rulemaking can be achieved by enacting the Regulatory Accountability Act, the REVIEW Act, and the Sunshine for Regulatory Decrees and Settlements Act.

"Recognizing the Protection of Motorsports Act of 2016" (RPM Act)

The Clean Air Act was never intended to allow the EPA to regulate racecars. However, the U.S. Environmental Protection Agency (EPA) has proposed a rule (Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles--Phase 2, 80 Fed. Reg. 40,138 (July 13, 2015), docket no. EPA–HQ–OAR–2014–0827) to prohibit the conversion of certified motor vehicles into vehicles that will be used solely for competition and the sale of emissions-related parts for use on such converted vehicles. The following is a brief summary of the law and reasons for the RPM Act:

- Motor Vehicle Air Pollution Control Act of 1965: Congress defined the term "motor vehicle" as "any self-propelled vehicle designed for transporting persons or property on a street or highway." Congress included "anti-tampering" language, making it illegal for "any person to remove or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this title *prior to* its sale and delivery to the ultimate purchaser" (emphasis added).
- Clean Air Act Amendments: 1970: Lawmakers expand the anti-tampering provision to provide that no person can render the emissions controls inoperative "after such sale and delivery to the ultimate purchaser." Congress also clarifies that the law does not apply to vehicles manufactured or modified for racing. The clarification was included in the congressional conference committee report.
- Clean Air Act Amendments: 1977: No changes impacting racecars.
- Clean Air Act Amendments: 1990: Congress provides the EPA with the authority to regulate nonroad vehicles/engines. Since the term "nonroad vehicle" could easily have been interpreted to include race vehicles, Congress included language to unequivocally exclude vehicles used solely for competition from the definition of "nonroad vehicle" ("*The term 'nonroad vehicle' means a vehicle that is powered by a nonroad engine and that is not a motor vehicle or a vehicle used solely for competition*"). The fact that Congress separated out "vehicles used solely for competition" from "motor vehicles" in the definition of nonroad vehicle is also instructive, as it indicates the term "motor vehicle" was not understood as covering "vehicles used solely for competition." It is also noteworthy that Congress referenced racecars as vehicles *used* solely for competition – not vehicles built solely for competition.

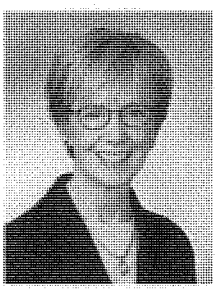
RPM Act: It is clear through statute and legislative history that Congress never intended to provide the EPA with authority to regulate vehicles used solely for competition, including vehicles modified to be used exclusively for racing. Despite this clarity, the EPA does not recognize this limitation on its authority. Legislation is necessary to reinforce the mandate. The following two changes to the Clean Air Act would:

1) Section 3: Amend the anti-tampering provision (42 U.S.C. 7522) to clarify that removal or alteration of the emission controls of a motor vehicle are not tampering if done for the purpose of converting the motor vehicle into a vehicle that will be used solely for competition. It further clarifies that a vehicle used solely for competition is not subject to the anti-tampering provisions.

2) Section 4: Amend the definition of "motor vehicle" (42 U.S.C. 7550) to clarify that it does not include a "nonroad vehicle or a vehicle used solely for competition."

Regulatory Studies Center
Columbian College of Arts & Sciences

Countdown To Midnight On The President's Regulatory Priorities



by Susan E. Dudley, Director

January 26, 2016

The full text of this commentary originally appeared on Forbes.com where the author is a reoccurring contributor.

Regulatory activity tends to surge in the final year of a presidential administration. Significant legislation from Congress is unlikely, and regulations are one of the few tools available for outgoing executive branch officials wanting to leave a legacy. The last three months in particular have historically seen a flurry of "midnight regulation" before a new president is sworn in. In an effort to get ahead of that rush, Howard Shelanski, Administrator of the Office of Information & Regulatory Affairs (OIRA), recently sent a memo to executive agencies asking them to, *"to the extent feasible and consistent with [their] priorities, statutory obligations, and judicial deadlines, … strive to complete their highest priority rulemakings by the summer of 2016 to avoid an end-of-year scramble that has the potential to lower the quality of regulations that OIRA receives for review and to tax the resources available for interagency review."*

If agencies heed Shelanski's guidance in this memo, it may help ensure that new regulations receive adequate scrutiny, which may translate to better regulatory outcomes. Research suggests that during midnight periods, OIRA spends less time reviewing each regulation, which can lead to a spike in lower-quality regulations. Another motive for acting early is that last minute regulations are more vulnerable to being overturned by congress or the next president. (I'll have more to say about this in future posts.)

Whether the Shelanski memo has any effect on the pace and quality of regulations at midnight remains to be seen, however. I served as OIRA Administrator during the last two years of the Bush Administration, and know from experience that the pressures and incentives to complete regulations before the stroke of midnight are powerful. Like Administrator Shelanski, I admonished regulatory agencies to focus on their priorities long before the final few months of the president's term.

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President Obama's Regulatory Output: Looking Back at 2015 and Ahead to 2016



by Daniel R. Pérez, Policy Analyst

January 12, 2016

In 2015, President Obama's executive agencies issued 62 economically significant rules—those defined in Executive Order 12866 as likely to have "an annual effect on the economy of $100 million or more," making last year the second most active regulatory year of his presidency. Many of these rules focused on his regulatory priorities, including stricter environmental standards and implementation of the Affordable Care Act (ACA) and the Dodd-Frank Wall Street Reform. This commentary looks back at the number of regulations published in 2015 and ahead to 2016, evaluating the President's activity in the context of regulatory output of previous administrations.

Regulatory Output in 2015

According to the government database at Reginfo.gov, executive agencies issued 62 economically significant final rules in 2015. To put this number in context, these agencies under Presidents Clinton and Bush published 36 and 44 economically significant rules, respectively, during their second-to-last years in office.

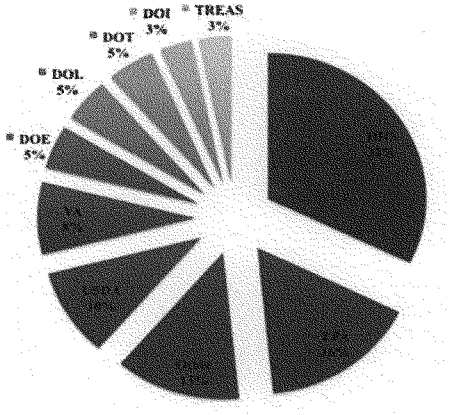
From the beginning of his term until the end of December 2015, executive agencies had published 392 economically significant final rules, surpassing the total number published during the entire terms of the Bush Administration (358) by the end of August and the Clinton Administration (361) by September. Additionally, President Obama averaged a rate of 5.2 economically significant rules per month in 2015, compared to President Clinton's rate of 3 per month and President Bush's rate of 3.6 in their penultimate years.

Economically Significant Rules Published under Different Administrations

President	Economically Significant Rules	Rules Published per Month, Second-to-Last Year in Office
Clinton	361	3
Bush	358	3.6
Obama	392 (As of January 2016)	5.2

The Department of Health and Human Services (HHS) was the most active, with 20 economically significant rules—the majority of which—16, implemented aspects of the ACA. This brings the total number of economically significant rules passed under the ACA to 98, with many more still required for implementation of the law. The Environmental Protection Agency (EPA) published 10 rules, including its final rule for the Clean Power Plan.

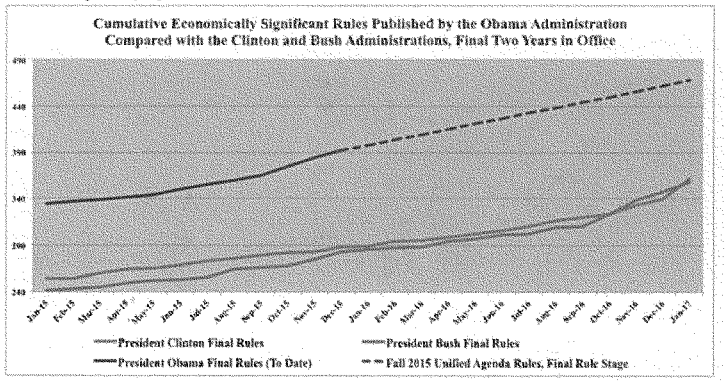
Distribution of Economically Significant Rules Published by Executive Regulatory Agencies in 2015



Rules Listed in the Unified Agenda as Slated for Publication in 2016

The latest *Unified Agenda*, published on November 19, 2015, lists 76 economically significant rules that agencies plan to publish in final form over the next 12 months. Among these there are 7 U.S. Department of Agriculture (USDA) rules, 27 HHS rules, and 10 Department of Energy (DOE) rules—predominantly regarding stricter energy conservation and efficiency standards for consumer products. Assuming that regulatory agencies publish all of these rules, it would bring President Obama's 8-year regulatory total to 468 economically significant rules.

The ultimate count could be lower, if agencies do not complete the priorities as anticipated, however, this may be a conservative estimate of the final tally for the Obama Administration. The Agenda may not include regulations expected more than 12 months out (after the November election). Presidents have historically published more rules than those forecast by the *Unified Agenda* during their last year in office as they work to push through the last measures of their regulatory agendas.


Cumulative Economically Significant Rules Published by the Obama Administration
Compared with the Clinton and Bush Administrations, Final Two Years in Office
President Clinton Final Rules
President Bush Final Rules
President Obama Final Rules (To Date)
Fall 2015 Unified Agenda Rules, Final Rule Stage

Regulatory Output is Likely to Increase in 2016

Historically, regulatory agencies have dramatically increased the pace of their rulemaking as they rush to publish rules to finalize their regulatory agenda before the clock strikes midnight on their tenure in office. President Clinton's fall 1999 Agenda forecast 30 economically significant rules, yet his administration published 73 before he left office—22 of which were published just in the month of January, right before President Bush began his presidency. President Bush's 2007 fall agenda identified 49 upcoming final economically significant rules, but executive agencies actually published 75 before the end of his administration.

Economically Significant E.S. Rules Listed in the Fall Unified Agenda Preceding the Last Year of a President's Term in Office vs. Final Count of E.S. Rules Published

President	Fall Unified Agenda	E.S. Rules, Final Rule Stage	E.S. Rules, Proposed Rule Stage	E.S. Rules Published during Following Calendar Year	E.S. Rules Published during January, "Midnight" Period"	Total E.S. Rules published after the Fall Unified Agenda
Clinton	1999	30	59	51	22	73
Bush	2007	49	46	64	11	75
Obama	2015	76	68	?	?	?

Thus, though the *Unified Agenda* is the most reliable source available for forecasting regulatory activity, it only predicted 41% of the regulatory activity that occurred during the remainder of the Clinton Administration and only 65% of the Bush Administration's final regulatory output.

If this administration follows the historical trend, then 2016 and the following January before the next president takes office are likely to leave the Obama Administration with a final count of economically significant regulations well above 468.

Regulatory Studies Center
Columbian College of Arts & Sciences

Regulatory Reboot: Options for Revisiting Midnight Regulations



by Susan E. Dudley, Director

February 23, 2016

Regulatory Reboot: Options for Revisiting Midnight Regulations

The Office of Information and Regulatory Affairs is bracing for the rush of regulatory activity that typically comes during the final year of a presidential administration. A government planning document lists 95 economically significant final regulations[1] as priorities for President Obama's final year in office. But according to a new report from the Congressional Research Service, any rule published after May 16 runs the risk of being summarily overturned in 2017.

The Congressional Review Act

Under the Congressional Review Act (CRA), congress has 60 working days after a final rule is issued to review it and decide whether to send a "joint resolution of disapproval" to the president. Not surprisingly, presidents have been unwilling to sign disapprovals of their own regulations, so the few disapproval resolutions that have made it out of congress usually die when they reach the president's desk. For example, in the last year, President Obama has vetoed resolutions disapproving the Environmental Protection Agency's Waters of the United States rule, and the National Labor Relations Board's union organizing rule.

However, there is a window at the end of an administration when congressional resolutions of disapproval would land on the desk of the next president, reducing that veto threat. For rules issued with less than 60 working days left in the current Congress, the 60-day review clock starts over in the next Congress. According to CRS's review of the current legislative calendar, that means that the 115th Congress seated in January 2017 will have a chance to review any rule issued after May 16, 2016. If the new Congress resolves to disapprove any of those regulations, the 45th president will be the one to sign or veto that resolution.

Since it was enacted in 1996, the CRA has only been used to overturn one regulation—an Occupational Safety and Health Administration rule aimed at addressing ergonomic injuries in the workplace. The ergonomics regulation was issued amid much controversy late enough in the Clinton Administration that the new Congress had an opportunity to review it. It sent a resolution of disapproval to President Bush, who signed it.

A Blunt Tool

The CRA is a blunt tool for dealing with last minute regulations; once a rule is disapproved, the Act prohibits an agency from issuing a regulation that is "substantially the same." Legislators may find this feature appealing for some controversial rules. However, for fine-tuning a regulation that may address shared objectives but be troubling in its details (perhaps as a result of truncated public input or rushed analysis to meet the midnight deadline), reformers may need to look to other options.

The Next President's Options

On his or her first day in office, the next president is likely to take action to stop the flow of regulations by directing agencies 1) not to send regulations to the Federal Register until they first are approved by the his or her policy officials, and 2) to retrieve from the Federal Register all regulations not yet published. Like past presidents, he or she may also direct agencies to publish notices in the Federal Register extending effectiveness deadlines for potentially controversial rules while the new administration considers its options. The Obama administration has learned from its predecessors of the vulnerability of regulations issued during a transition, however, so these actions by the next president may not capture too many regulations.

To revise or withdraw a regulation that is already final (even if it is not yet effective), a new president would have to begin the process of regulatory development de novo. That would mean seeking public comment on alternative approaches, developing an administrative record, and issuing a final rule based on that record. This would take at least a year and probably longer. Then, the rule would most certainly be the subject of litigation, with plaintiffs being able to point to the previous record to question the merits of the revised rule.

A more subtle way to alter a regulation's impacts might be through enforcement. When administrations change, how rules are interpreted sometimes changes. For example, the Department of Homeland Security altered its approach to enforcing immigration laws last year. Similarly, EPA in the Clinton administration began to bring enforcement actions against electric utilities that had undertaken what had previously been considered routine maintenance and repair not subject to new source review regulations.

Working with the Judiciary

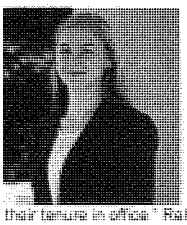
The more controversial regulations are likely to be litigated in court. How vigorously a new administration defends those cases will influence the ultimate disposition of the regulation. For example, the next administration will likely be responsible for defending the Clean Power Plan rule, which was recently put on hold while the United States Court of Appeals for the District of Columbia Circuit hears the case.

Other Congressional Options

Even without the expedited procedures of the CRA, congress can exercise control over regulatory outcomes by limiting appropriations for enforcement, or it could issue new legislation that supersedes or overrides a regulation.

Regulatory Studies Center
Columbian College of Arts & Sciences

Looking Ahead to Regulation in 2016



by Sofie E. Miller, Senior Policy Analyst

January 20, 2016

Although Congress will not likely enact new legislation in President Obama's final year in office, regulatory agencies are a different matter. As Daniel Pérez observed, regulatory agencies have historically "dramatically increased the pace of their rulemaking as they rush to publish rules to finalize their regulatory agenda before the clock strikes midnight on their tenure in office." Relying on Administration reports, Pérez predicts federal agencies will issue more than 75 economically significant final regulations this year. This commentary examines some of the most noteworthy of these upcoming regulatory actions.

Energy Efficiency

In the past few years, the Department of Energy has proposed and finalized a slew of energy efficiency regulations limiting the amount of energy or water that can be used by appliances such as refrigerators, microwaves, and dishwashers. Despite the fact that these rules may have large costs for consumers, DOE is poised to issue a spate of new efficiency standards in 2016 including eight final rules and nine proposed rules.

Forthcoming Energy Efficiency Final Rules ($ Millions)

RULE	Total Benefit	Annual Benefit	Total Cost	Annual Cost
Energy Conservation Standards for Commercial and Industrial Pumps	$1,900	$112	$300	$17.5
Energy Efficiency Standards for Residential Dehumidifiers	$3,210	$185	$220	$12.5
Energy Conservation Standards for Residential Boilers	$2,220	$657	$540	$158
Energy Conservation Standards for Small, Large, and Very Large Commercial Package A/C and Heating Equipment	$94,100	$4,990	$14,900	$792
Energy Conservation Standards for Commercial Warm Air Furnaces	$3,645	$203	$62	$3.48
Energy Conservation Standards for Residential Conventional Cooking Products	$13,200	$734	$600	$33
Energy Conservation Standards for Hearth Products	$5,373	$327	$1,004	$61.2
TOTAL	$123,648	$7,208	$17,626	$1,077.7

DOE estimates that the rules finalized in 2016 will yield $123.6 billion in total benefits and $17.6 billion in total costs, but the vast majority of those benefits—and costs—stem from a single rule setting efficiency standards for commercial heating and cooling units. This rule is responsible for 71% of the total benefits expected from final efficiency rules in 2016, and 85% of the expected costs. Even more unusual is that

DOE is issuing this rule as a direct final rule, meaning that it is bypassing the traditional notice-and-comment process before becoming law.

Health & Safety

The Food and Drug Administration (FDA) and the Occupational Safety and Health Administration (OSHA) plan to issue a number of high-priority rules in 2016. Pursuant to the Food Safety Modernization Act of 2011, FDA plans to issue a final rule on the sanitary transport of human and animal food before April, in addition to a final rule regulating e-cigarettes and cigars. FDA's e-cigarette rule is currently under review at the Office of Information and Regulatory Affairs (OIRA).

OSHA expects to finalize its permissible exposure limits for occupational exposure to crystalline silica by February – after almost 20 years of deliberation. Our analyses have found that OSHA bases its regulation on outdated safety information and ignores evidence that adverse health effects from silica exposure have declined significantly in recent years, both of which limit the likelihood that the rule will achieve its intended outcome. The final rule has been under OIRA review since just before Christmas.

Environment

While most of the Environmental Protection Agency's (EPA) priorities for the Obama Administration have already been accomplished, the agency plans to take action on two significant rules in 2016: final fuel economy standards for trucks, and the proposed and final Renewable Fuel Standards (RFS) for 2017. EPA estimates that its final corporate average fuel economy (CAFE) standards for medium- and heavy-duty trucks will result in large net benefits for consumers; however, our analysis finds that the vast majority of these benefits are "private benefits" that may not actually represent consumers' preferences. EPA expects to finalize its rule by July.

The RFS program requires refiners to blend specific amounts of renewable fuels into transportation fuel, such as gasoline and diesel. Our analysis of the RFS program has found that mandating biofuel quotas incurs large costs for consumers without benefiting the environment. The availability of new scientific, technical, and economic information shows that the RFS program does not work as it was intended to, and is likely causing significant environmental harm through increased greenhouse gas emissions and damage to waterbodies and ecosystems. EPA plans to propose the latest RFS in June and finalize its standards by December.

December 28, 2015

Filed: www.regulations.gov

U.S. Environmental Protection Agency (EPA)
Air Docket (MC-28221T)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

National Highway Traffic Safety Administration (NHTSA)
Docket Management Facility (M-30) West Building, Rm. W12-140
1200 New Jersey Avenue, SE
Washington, DC 20590

Re: Docket: EPA–HQ–OAR–2014–0827; NHTSA-2014-0132
Comments: Proposed Rule: Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles--Phase 2: Vehicles Used Solely in Competition

Dear Sir/Madam:

On July 13, 2015, the U.S. Environmental Protection Agency (EPA) and National Highway Traffic Safety Administration (NHTSA) issued a proposed rule to establish Phase 2 regulations for greenhouse gas (GHG) emissions and fuel consumption for new on-road medium- and heavy-duty vehicles. The EPA included a proposal hidden within the rulemaking to make it illegal for certified motor vehicles to be converted into vehicles used solely for competition. Specifically, the proposed rule ("Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles--Phase 2") would add the following language to 40 C.F.R. Part 86 (40 C.F.R. § 86.1854), a section of the regulations applicable to new and in-use vehicles, including light duty vehicles:

"Certified motor vehicles and motor vehicle engines and their emission control devices must remain in their certified configuration even if they are used solely for competition or if they become nonroad vehicles or engines". 80 Fed. Reg. 40138, 40565 (July 13, 2015).

These comments are limited to that topic. Although the comments are filed after the October 1, 2015 deadline, SEMA contends the change regarding competition use only vehicles is not within the scope of the GHG rulemaking for medium- and heavy-duty vehicles and that the public was not adequately put on notice of its inclusion. The comments will also address the merits of the issue.

The Specialty Equipment Market Association (SEMA) represents the $36 billion specialty automotive industry. The trade association includes more than 6,800 businesses nationwide that manufacture, distribute, market and retail specialty parts and accessories for motor vehicles. The

Specialty Equipment Market Association (SEMA)
1317 F Street, NW; Suite 500; Washington, DC 20004
Telephone: 202/783-6007; Fax: 202/783-6024

industry employs over one million Americans and produces appearance, performance, comfort, convenience and technology products for passenger and recreational vehicles, including vehicles used solely in competition.

The following addresses whether the EPA provided adequate notice. The comments will then address the EPA's proposed policy change with respect to vehicles used solely for competition.

Administrative Procedure Act

Overview: The Administrative Procedure Act (hereinafter, the "APA") establishes the process by which federal agencies develop and issue regulations. *See* Administrative Procedure Act, 5 U.S.C. § 553 (2015). Among other considerations, the law is intended to provide adequate opportunity for the public, and interested parties in particular, to comment on proposed rules. SEMA contends that the EPA failed to comply with the APA when it proposed changes to the regulations to prohibit conversion of certified motor vehicles to competition use only vehicles. SEMA's analysis below includes factors that courts have considered when evaluating agency compliance with the APA.

Failure to Alert Public of Rulemaking: The table of contents for the 629-page rulemaking does not alert the public that the EPA is proposing a significant policy change on how competition use engines/vehicles are regulated. The table of contents does not include reference to "Competition Use Engines/Vehicles." The topic is covered along with other seemingly minor issues under the heading "XIV. Other Proposed Regulatory Provisions."

Non-Germane: The subject rulemaking will establish the next generation GHG emissions and fuel economy standards for medium- and heavy-duty engines and vehicles. The subject matter referenced in the rulemaking's title and considered within the broader scope of the rulemaking does not logically encompass the modification of a certified vehicle for competition use. Further, this is not the first time the EPA has issued GHG emission standards for medium- and heavy-duty engines/vehicles. Therefore, inclusion of an unrelated topic within a continuing series of rulemakings is unexpected, if not unprecedented.

Rulemaking Does Not Cover Light-Duty Vehicles: By its terms, the rulemaking covers medium- and heavy-duty engines and vehicles. It does not apply to light-duty engines and vehicles, which are regulated under separate EPA rulemakings. Nevertheless, many certified light-duty vehicles may be modified for competition use, and the section of the rules into which the EPA seeks to insert a prohibition against street-to-race vehicle conversions is applicable to light-duty vehicles. The public has not been put on notice that the rule governing medium- and heavy-duty engines/vehicles potentially applies to certified light-duty engines/vehicles.

Change of Policy: Before the Clean Air Act was enacted and since that date, thousands if not millions of certified vehicles have been modified to become vehicles used solely for

competition. Products have been manufactured, sold and installed on these competition vehicles throughout this time. SEMA has been working with the EPA on ways to regulate potential dual-use products, defined as products that could be used on both competition-use only and certified motor vehicles. However, the EPA has never implemented a policy making it illegal for certified vehicles to become competition-use only vehicles. Such a policy would overturn decades of understanding within the regulated community and expose that community to unfair findings of noncompliance and civil penalties.

Arbitrary, Capricious and an Abuse of Discretion: The EPA is seeking to change policy that has been in place for decades and it does not adequately address this change in the summary or explanatory text published in the Federal Register. The only text that could be read as explaining the proposed addition of the language to prohibit street-to-race vehicle conversions are the following paragraphs within the 629-page proposed rule, which do not even reference the part being changed – part 86:

> The existing prohibitions and exemptions in 40 CFR part 1068 related to competition engines and vehicles need to be amended to account for differing policies for nonroad and motor vehicle applications. In particular, we generally consider nonroad engines and vehicles to be ''used solely for competition'' based on usage characteristics. This allows EPA to set up an administrative process to approve competition exemptions, and to create an exemption from the tampering prohibition for products that are modified for competition purposes. There is no comparable allowance for motor vehicles. A motor vehicle qualifies for a competition exclusion based on the physical characteristics of the vehicle, not on its use. Also, if a motor vehicle is covered by a certificate of conformity at any point, there is no exemption from the tampering and defeat-device prohibitions that would allow for converting the engine or vehicle for competition use. There is no prohibition against actual use of certified motor vehicles or motor vehicle engines for competition purposes; however, it is not permissible to remove a motor vehicle or motor vehicle engine from its certified configuration regardless of the purpose for doing so.
>
> ***
>
> EPA is proposing in 40 CFR 1037.601(a)(3) to clarify that the Clean Air Act does not allow any person to disable, remove, or render inoperative (i.e., tamper with) emission controls on a certified motor vehicle for purposes of competition. An existing provision in 40 CFR 1068.235 provides an exemption for nonroad engines converted for competition use. This provision reflects the explicit exclusion of engines used solely for competition from the CAA definition of "nonroad engine". The proposed amendment clarifies that this part 1068 exemption does not apply for motor vehicles.

See Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles--Phase 2, 80 Fed. Reg. 40138, 40527, 40539 (July 13, 2015).

SEMA contends that to change the policy now, without proper public notice, would be considered arbitrary, capricious and an abuse of discretion under the APA. If the EPA intends to change decades of previously applied policy, SEMA contends such a change must take place within a separate rulemaking. Further, as will be explained below, SEMA contends that existing law establishes a clear policy for vehicles used solely for competition and that only Congress has the authority to make the proposed policy change, not the EPA through a rulemaking.

The EPA's proposed policy change has no basis in the evidence or analysis presented. Under the APA, an agency has an obligation to publish a statement of reasons that will be sufficiently detailed to permit potential judicial review. In this instance, the EPA has placed the burden on the public to provide justification for maintaining decades of previous interpretation of marketplace activities affirming that street vehicles can be modified to create vehicles to be used solely for competition. The EPA notes expanded powers when it states: "This allows EPA to set up an administrative process to approve competition exemptions, and to create an exemption from the tampering prohibition for products that are modified for competition purposes." While threatening in potential scope, this statement is unexplained and fails to meet a conclusion of reasonableness and rationality. For example, the term "administrative process" could be interpreted as authorizing the EPA to establish a database of motor vehicle registrations to confirm that none of the millions of vehicles in the national vehicle fleet have been converted to competition use.

Regulatory Flexibility Act

Reg-Flex Analysis: The proposed rule has the possibility of causing harm to a number of small businesses. Many companies, including small businesses, would be dramatically affected by this new rule. These companies sell hundreds of street vehicles for conversion to race vehicles, undertake the conversions, sell products for use on these vehicles and use the converted race vehicles to participate in the sport of automobile racing. The EPA has failed to conduct an analysis of how these companies would be potentially impacted, as required under the Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996. *See* 5 U.S.C. §§ 601-612 (2015).

The EPA has actually recognized the important role of these businesses and supported racing in a program titled "Green Racing: From the Raceway to Your Driveway." *See Green Racing: Frequently Asked Questions*, GREEN RACING 2011 PRESS KIT, http://www3.epa.gov/otaq/ld-hwy/green-racing/PDF/FAQ.pdf, and Green Racing Fact Sheet, http://www3.epa.gov/otaq/ld-hwy/green-racing/PDF/Quick_Facts.pdf (both attached). Working in collaboration with the American Le Mans Series (ALMS), the Green Racing program promoted innovation in racing that could be transitioned into use

in on-road vehicles. The EPA recognized that this transition would be possible because "[a]ll of the race cars have direct links to production vehicles," with some cars in the series described as "more production-based but are highly modified for racing." *See Program Announcement: Green Racing Initiative*, EPA420-F-10-058 (November 2010), http://www3.epa.gov/otaq/ld-hwy/420f10058.pdf (attached). Given this understanding on the part of the EPA, it is unclear how and when the current conflicting position was formulated, and the rulemaking materials provide no clarification.

Due Process Considerations

Constitutional due process demands agencies provide adequate notice to regulated individuals. This notice can be made through the informal notice and comment rulemaking process using the Federal Register, or actual notice may be provided directly to interested members of the public. As settled Supreme Court precedent instructs: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

The EPA has failed to provide actual notice of their proposed changes to the regulated industry despite ample opportunity to do so. SEMA has been in discussions with the EPA for years on the issue of street-to-race vehicle conversions. The discussions have focused on helping the EPA find ways to prevent racing products from finding their way onto street vehicles. In fact, EPA personnel participated in a presentation at an industry trade show sponsored by SEMA on November 5, 2015 to speak to this very issue and made no mention of the pending rulemaking proceeding. It does not seem unreasonable that the EPA should make some effort to communicate to the industry a rulemaking that seeks to regulate street–to-race vehicle conversions in light of this extensive history between the Agency and the regulated entities.

Where the Federal Register is used to provide constructive notice to interested parties, the entry should at least be drafted in a manner reasonably calculated to inform the reader that the agency is attempting to regulate in a particular area. In this instance, the EPA has titled its rulemaking "Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles--Phase 2," and its summary provides insufficient notice that light-duty engines and vehicles, specifically those used solely for competition, are affected by the proposed rule.

EPA Policy on Motor Vehicles Used for Competition

The proposed rule is attempting to bring vehicles used solely for competition within the purview of the Clean Air Act's definition of "motor vehicles" required to be certified to relevant mobile source emissions standards and remain in their certified configuration. This interpretation of the Clean Air Act's definition of "motor vehicle" is not in line with the statutory language or legislative history.

In the Motor Vehicle Air Pollution Control Act of 1965, Congress first defined the term "motor vehicle" for the purpose of regulating air pollution as "any self-propelled vehicle designed for transporting persons or property on a street or highway." *See* Motor Vehicle Air Pollution Control Act, Pub. L. No. 89-272, 79 Stat. 992 (1965) at § 208(2). The 1965 Act sought to regulate emissions from new motor vehicles by making it illegal for "any person to remove or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this title prior to its sale and delivery to the ultimate purchaser." *Id.* at § 203(a)(3) (hereinafter, the "anti-tampering provision").

In 1970, Congress passed the Clean Air Amendments of 1970 (hereinafter, the "1970 Clean Air Act"). Clean Air Act, Pub. L. No. 91-604, 84 Stat. 1676 (1970). The 1970 Clean Air Act created an unprecedented scheme for regulating both stationary and mobile sources of air pollution. The 1970 Clean Air Act did not disturb the definition of "motor vehicle" put in place in 1965 (nor did any other subsequent amendments to the law), but lawmakers did add language to regulate vehicles after first retail sale. The lawmakers expanded the anti-tampering provision to add that no person could render the emissions controls inoperative "after such sale and delivery to the ultimate purchaser." *Id.* at § 7(a)(3). Despite this intent to regulate some vehicles after first retail sale, Congress did not intend the 1970 Clean Air Act to extend the purview of the law to cover vehicles manufactured or modified for racing. The following clarification on this point was made during the House consideration of the congressional conference committee report on the Clean Air Act as signed into law by President Nixon (H.R. 17255):

> MR. NICHOLS. I would like to ask a question of the chairman, if I may.
>
> I am sure the distinguished chairman would recognize and agree with me, I hope, that many automobile improvements in the efficiency and safety of motor vehicles have resulted from experience gained in operating motor vehicles under demanding circumstances such as those circumstances encountered in motor racing. I refer to the tracks at Talladega in my own State, to Daytona and Indianapolis, competition.
>
> I would ask the distinguished chairman if I am correct in stating that the terms "vehicle' and "vehicle engine" as used in the act do not include vehicles or vehicle engines manufactured for, modified for or utilized in organized motorized racing events which, of course, are held very infrequently but which utilize all types of vehicles and vehicle engines?
>
> MR. STAGGERS. In response to the gentleman from Alabama, I would say to the gentleman they would not come under the provisions of this act, because the act deals only with automobiles used on our roads in everyday use. The act would not cover the types of racing vehicles to which the gentleman referred, and present law does not cover them either.

House Consideration of the Report of the Conference Committee, Dec. 18, 1970 (reprinted in *A legislative history of the Clean air amendments of 1970, together with a section-by-section index*, U.S. LIBRARY OF CONGRESS, ENVIRONMENTAL POLICY DIVISION, Washington: U.S. Govt. Print. Off. Serial No. 93-18, 1974, p. 117).

Neither the 1977 nor the 1990 revisions to the Clean Air Act altered this definition of "motor vehicle" as commented upon by Representatives Nichols and Staggers. *See* Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977); *see also* Clean Air Act Amendments, Pub. L. No. 101-549, 104 Stat. 2399 (1990).

While it is clear from the legislative history that the Clean Air Act was not intended to regulate race vehicles, that fact should have become even clearer as a result of the 1990 amendments to the Act. The amendments were made to provide EPA with authority to regulate non-road vehicles and the engines used therein. *See* 42 U.S.C. § 7550(10)-(11) (2015). Since the term "nonroad vehicle" could easily have been interpreted to include race vehicles, Congress used language to unequivocally exclude vehicles used solely for competition from the definition of "nonroad vehicle." *See id.* ("The term 'nonroad vehicle' means a vehicle that is powered by a nonroad engine and that is not a motor vehicle or a vehicle used solely for competition.").

The fact that Congress separated out "vehicles used solely for competition" from "motor vehicles" in the definition of "nonroad vehicle" is also instructive, as it indicates the term "motor vehicle" was not understood as covering a "vehicle used solely for competition." *See* 42 U.S.C. § 7550(10) (2015) (defining a nonroad motor vehicle as "not a motor vehicle *or* a vehicle used solely for competition") (emphasis added). It is also noteworthy that Congress referenced racecars as vehicles *used* solely for competition – not vehicles built solely for competition.

Based on the statutory text and the legislative history, it is clear that vehicles used solely for competition, including a race vehicle that has been created by converting a certified vehicle to a racecar, are not within the purview of the Clean Air Act. Administrative rulemaking is not a process by which an agency is permitted to circumvent Congress, however, it appears that the EPA is attempting to alter current law as it relates to vehicles used solely for competition. The EPA's proposal would alter current law by adding the following provision to the regulations: "Certified motor vehicles and motor vehicle engines and their emission control devices must remain in their certified configuration even if they are used solely for competition or if they become nonroad vehicles or engines." *See* Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles--Phase 2, 80 Fed. Reg. 40138, 40565 (July 13, 2015). This new language is in conflict with the statutory text and legislative history and should not be inserted into the regulations unless Congress indicates an intent for such a rule to be put in place.

Other Implications and Considerations

The proposed rule would create new law without adequate notice to the regulated parties, most importantly the motorsports industry, and upset decades of industry practice. The National Association for Stock Car Auto Racing (NASCAR) was founded in 1948 on the premise that ordinary street cars could be converted into racing machines. Conversely, participants in demolition derbies seek to destroy other former street vehicles that have been modified for potential destruction. In between these two extremes are a myriad of other types of racing events, with participants that range from professionals to novices using vehicles that have been modified for racing use. If the EPA intends to continue its push for a policy prohibiting conversion of street vehicles to vehicles to be used solely for competition, it must put the motorsports industry on proper notice and explain its rationale, including the statutory authority for such a prohibition.

At least one other regulatory hurdle must be addressed if the EPA continues to pursue this new policy. Motor vehicles are regulated by both the EPA and NHTSA. Similar to the Clean Air Act's tampering prohibition, under the Motor Vehicle Safety Act it is illegal for a manufacturer, distributor, dealer, or motor vehicle repair business to knowingly make inoperative any part of a device or element of design installed on or in a motor vehicle or motor vehicle equipment in compliance with an applicable motor vehicle safety standard. *See* 49 U.S.C. § 30122(b) (2015). The Motor Vehicle Safety Act's "make inoperative" prohibition does not apply to a certified motor vehicle that has been modified into a vehicle used solely for competition, placing it in conflict with the EPA's proposed interpretation of the Clean Air Act's tampering prohibition. The EPA must explain how its proposed application of the Clean Air Act would harmonize with NHTSA's application of the Motor Vehicle Safety Act.

Beyond statutory differences, the issue has significant economic and safety implications. Competition use vehicles are modified in shops across the nation and the vehicles are outfitted with safety equipment such as five-point seat belts, roll bars, cages and safety netting. These sales and services would cease as a result of the EPA's proposed policy. The EPA's unilateral action would threaten auto sector jobs and stifle the production of new and innovative safety equipment due to decreased product sales. Since many of the companies associated with these products and services are small businesses, the EPA's Regulatory Flexibility Act analysis must take this issue into consideration.

Conclusion

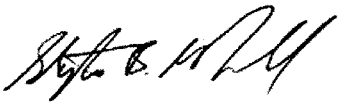
Based on the foregoing, SEMA objects to the inclusion of language relating to vehicles used solely for competition in this greenhouse gas rulemaking and requests that it be removed. Among other problematic rhetoric unnecessarily included in the proposal, the following new language regulating all vehicles, including light-duty vehicles, is especially out of place in a rulemaking for greenhouse gas standards covering medium-

and heavy-duty vehicles. The language is also out of sync with governing law. Therefore, we specifically request the EPA remove the following proposed language:

> 67. Section 86.1854-12 is amended by adding paragraph (b)(5) to read as follows:
>
> § 86.1854-12
> Prohibited acts.
>
> * * * * *
>
> (b) * * *
>
> (5) Certified motor vehicles and motor vehicle engines and their emission control devices must remain in their certified configuration even if they are used solely for competition or if they become nonroad vehicles or engines; anyone modifying a certified motor vehicle or motor vehicle engine for any reason is subject to the tampering and defeat device prohibitions of paragraph (a)(3) of this section and 42 U.S.C. 7522(a)(3).

Thank you for this opportunity to submit these comments. If you have any questions, please feel free to contact me at 202/783-0864 or by e-mail at stevem@sema.org.

Sincerely,

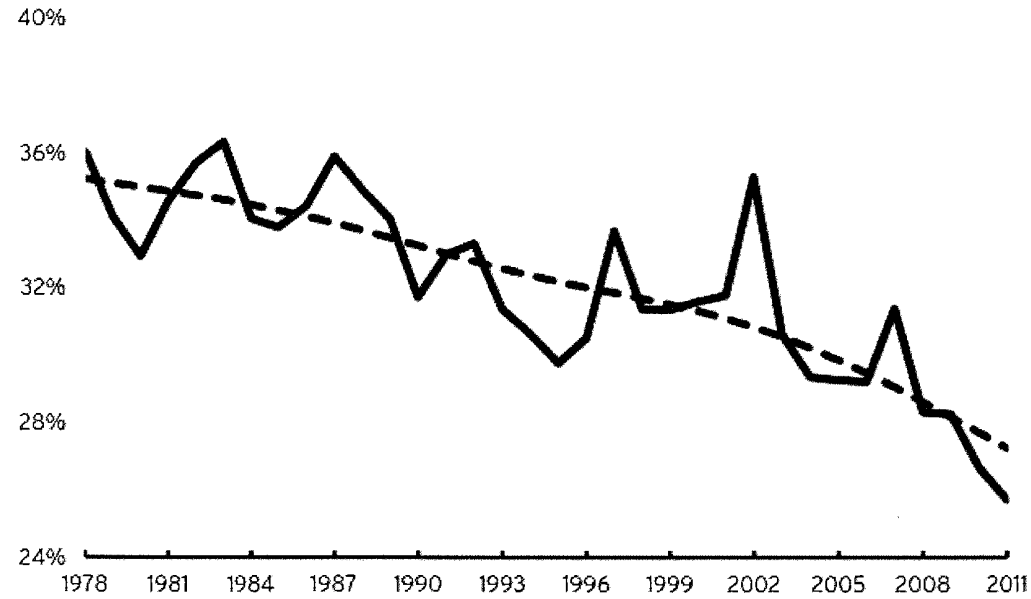


Stephen B. McDonald
Vice President, Government Affairs

Figure 2.

Business dynamism has been steadily declining over the last three decades

Job Reallocation Rate and Trend, 1978-2011



Source: U.S. Census Bureau, BDS; authors' calculations
Note: Trend is calculated by applying a Hodrick-Prescott filter with a multiplier of 400